No. 07-1078
Vide 07-1059
Title: USEC Inc., et al., Petitioners
v.
Eurodif S.A., et al.
Docketed: February 20, 2008
Lower Ct: United States Court of Appeals for the Federal Circuit
Case Nos.: (2007-1005, 2007-1006)
Decision Date: September 21, 2007
**Questions Presented**

| ~~~Date~~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Dec 10 2007 | Application (07A495) to extend the time to file a petition for a writ of certiorari from December 20, 2007 to January 22, 2008, submitted to The Chief Justice. |
| Dec 11 2007 | Application (07A495) granted by The Chief Justice extending the time to file until January 22, 2008. |
| Jan 11 2008 | Application (07A495) to extend further the time to file a petition for a writ of certiorari from January 22, 2008 to February 15, 2008, submitted to The Chief Justice. |
| Jan 15 2008 | Application (07A495) granted by The Chief Justice extending the time to file until February 15, 2008. |
| Feb 15 2008 | Petition for a writ of certiorari filed. (Response due March 21, 2008) |
| Mar 17 2008 | Brief amicus curiae of Committee to Support U.S. Trade Laws filed. VIDED. |
| Mar 21 2008 | Brief of respondent Ad Hoc Utilities Group in opposition filed. VIDED. |
| Mar 21 2008 | Brief of respondents Eurodif S.A., et al. in opposition filed. VIDED. |
| Apr 1 2008 | Reply of petitioner USEC Inc., et al. filed. |
| Apr 2 2008 | DISTRIBUTED for Conference of April 18, 2008. |
| Apr 21 2008 | Petition GRANTED the case is consolidated with No. 07-1059, and a total of one hour is allotted for oral argument. |
| May 28 2008 | The time within which to file the joint appendix and petitioners' briefs on the merits is extended to and including July 16, 2008. VIDED. |
| May 28 2008 | The time within which to file respondents' briefs on the merits is extended to and including September 15, 2008. VIDED. |
| Jul 16 2008 | Brief of petitioner United States filed. VIDED. |
| Jul 16 2008 | Joint appendix filed. (Statement of costs received.) VIDED. |
| Jul 16 2008 | Brief of petitioners USEC Inc., et al. filed. VIDED. |
| Jul 16 2008 | Motion for leave to file two volumes of the joint appendix under seal filed by respondent United States. VIDED (CL Page 1) |
| Jul 23 2008 | Brief amicus curiae of Committee to Support U.S. Trade Laws filed. |

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| | VIDED. |
| Aug 6 2008 | Motion DISTRIBUTED for Conference of September 29, 2008. |
| Aug 8 2008 | CIRCULATED. |
| Aug 18 2008 | SET FOR ARGUMENT ON Tuesday, November 4, 2008. |
| Sep 5 2008 | Record received from the U.S.C.A. for the Federal Circuit (2 boxes). |
| Sep 15 2008 | Brief of respondents Eurodif S.A., et al. filed. VIDED. (Distributed) |
| Sep 15 2008 | Brief of respondent Ad Hoc Utilities Group filed. VIDED. (Distributed) |
| Sep 19 2008 | Motion for divided argument filed by petitioner United States. VIDED. |
| Sep 22 2008 | Brief amicus curiae of Alcoa, Inc. filed. VIDED. (Distributed) |
| Sep 22 2008 | Brief amicus curiae of Professor Raj Bhala filed. VIDED. (Distributed) |
| Sep 22 2008 | Brief amicus curiae of Techsnabexport filed. VIDED. (Distributed) |
| Sep 22 2008 | Brief amicus curiae of National Atomic Company "Kazatomprom" filed. VIDED. (Distributed) |
| Oct 2 2008 | Application (08A283) to extend the time to file a reply brief on the merits from October 15, 2008 to October 22, 2008, submitted to The Chief Justice. VIDED. |
| Oct 6 2008 | Motion for leave to file two volumes of the joint appendix under seal GRANTED. |
| Oct 14 2008 | Motion for divided argument filed by petitioner United States GRANTED. VIDED. |
| Oct 15 2008 | Letter and attachment received from counsel for the respondents. VIDED. (Distributed). |
| Oct 15 2008 | Reply of petitioners USEC Inc., et al. filed. VIDED. (Distributed) |
| Oct 20 2008 | Reply of United States filed. VIDED. (Distributed) |
| Nov 4 2008 | Argued. For petitioner in No. 07-1059: Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, C.C. For petitioners in No. 07-1078: H. Bartow Farr, Washington, D.C. For respondents: Caitlin J. Halligan, New York, N.Y. |

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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

USEC INC. and
UNITED STATES ENRICHMENT CORPORATION,

*Petitioners,*

*v.*

EURODIF S.A.; COMPAGNIE GENERALE DES MATIERES NUCLEAIRES; COGEMA, INC.; AD HOC UTILITIES GROUP; and UNITED STATES,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The antidumping law allows for duties to be imposed on "foreign merchandise . . . sold in the United States at less than its fair value." The Commerce Department construed that phrase as including transactions in which a U.S. customer furnishes cash and fungible raw material to a foreign producer and receives a substantially transformed finished product. The question presented in this case is whether the Federal Circuit erred in failing to accord *Chevron* deference to that construction, when a contrary one will prevent the Commerce Department from applying the antidumping law to imports causing or threatening material injury to a domestic industry.

## RULE 29.6 STATEMENT

USEC Inc. owns 100% of the stock of United States Enrichment Corporation. USEC Inc. has no parent corporation and no publicly held company owns 10% or more of its stock. USEC Inc. is a publicly held company whose stock is traded on the New York Stock Exchange under the symbol "USU".

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USEC Inc. and United States Enrichment Corporation (collectively "USEC") respectfully petition for a writ of certiorari to review the judgment of the Federal Circuit in this case.

## OPINIONS BELOW

The final judgment of the court of appeals is reported at 506 F.3d 1051. (App. 31a).

The question presented by this petition was raised and decided on interlocutory appeal; the court of appeals' judgment on interlocutory appeal is reported at 411 F.3d 1355 (App. 1a), affirmed on rehearing at 423 F.3d 1275 (App. 24a). The decision of the U.S. Court of International Trade from which interlocutory appeal was taken is reported at 281 F. Supp. 2d 1334 (App. 268a). The Department of Commerce's original determination is reported at 66 Fed. Reg. 65,877, (App. 41a), and its redetermination following initial judicial review, (App. 147a), is available at http://ia.ita.doc.gov/remands/03-34.pdf.

## JURISDICTION

The judgment of the court of appeals was entered on September 21, 2007. Extensions of the time for filing a petition for writ of certiorari were granted by Chief Justice Roberts on December 11, 2007, and January 15, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 1673 of Title 19, U.S. Code (2000), provides in relevant part that:

> If—
>
> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise, or by reason of sales (or the likelihood of sales) of that merchandise for importation,
>
> then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.

## STATEMENT OF THE CASE

At issue is a fundamental question with regard to the scope of the antidumping law of the United States: whether the Commerce Department can reasonably determine that imported foreign merchandise has been "sold" within the meaning of that law where a foreign producer receives fungible raw material and cash from a U.S. customer and delivers a substantially transformed finished product.

Based on the totality of the circumstances, the Commerce Department concluded that the transactions in this case—involving low enriched uranium—constituted sales of merchandise under the antidumping law. Because the transactions were found to have taken place at dumped prices and to have injured a U.S. industry, the Department imposed off-setting duties. The Federal Circuit, however, reversed Commerce's determination, concluding that the transactions involved sales of services outside the scope of the antidumping law. It relied on its own interpretation of certain provisions of the contracts as creating a continuous chain of title in the buyer to the raw materials and finished product. The court's decision was subsequently implemented so as to exclude imports made pursuant to such contracts from the scope of the antidumping order.

The Federal Circuit's decision was clearly improper under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as it usurped the Commerce Department's authority to interpret and apply ambiguous terms in a statute the Department is responsible for administering. By giving conclusive

effect to the contract terms drafted by the foreign producer and U.S. customer, and ignoring the circumstances of the transactions and the purposes of the antidumping law, the decision undermines the ability of the Commerce Department to fulfill its statutory mission of protecting U.S. industries from unfairly priced imports. At the same time, the decision threatens a historic disarmament agreement between the United States and Russia. This agreement uses the U.S. commercial nuclear fuel market as a channel to facilitate the conversion of nuclear weapons of the former Soviet Union to peaceful use—an objective that will be jeopardized if that market is disrupted by unfairly priced imports of enriched uranium. Such market disruption would also threaten the viability of the sole remaining domestic uranium enrichment facility, as well as a project to build a new enrichment facility employing a more advanced enrichment technology, both of which utilize the only U.S. enrichment technologies available to meet U.S. defense needs.

Thus, the Federal Circuit's decision—indefensible under *Chevron*—has enormous implications for both the scope of the antidumping law and U.S. energy security and non-proliferation objectives.

## I. STATUTORY BACKGROUND

"Dumping" describes the practice of international price discrimination whereby a producer or exporter sells its merchandise in an export market at less than fair value. The U.S. antidumping regulatory framework is embodied in the Tariff Act of 1930, as amended. The Tariff Act defines "dumping" as "the sale or likely sale

of goods at less than fair value," 19 U.S.C. § 1677(34) (2000).[1] The Act provides that, when "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," and when those sales are found to cause or threaten to cause "material injury" to an industry in the United States, antidumping duties shall be imposed on imports of that merchandise. *Id.* § 1673.

The Department of Commerce and the United States International Trade Commission are jointly responsible for administering the antidumping law. Commerce determines whether foreign merchandise is being sold in the United States at less than its fair value, *id.* §§ 1673(1), 1677(1), and the Commission determines whether a domestic industry producing a product "like" the imported merchandise has been materially injured or threatened with material injury. *Id.* § 1673(2). Upon the filing of a petition by an affected domestic industry, both agencies conduct their own investigations, and if both agencies make affirmative final determinations, Commerce will issue an antidumping duty order. *Id.* § 1673d(c)(1).

In its investigation, Commerce calculates a dumping margin based on the "normal value," which is generally determined by reference to the prices at which the producer or exporter sells the same goods in its home market or in third-country markets. The dumping margin is the amount by which the normal value exceeds the U.S. price of the subject merchandise. *Id.* § 1677b. Importers of merchandise subject to antidumping duty orders must then pay cash deposits in the amount of this dumping margin in order to enter that merchandise into the United States.

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1. Unless otherwise indicated, all references to the United States Code are to the 2000 edition.

*Id.* § 1673e(a)(3). The actual amount of duty owed on particular imports is determined retrospectively through administrative reviews that may be requested on an annual basis. *Id.* § 1675(a)(1).

## II. FACTUAL BACKGROUND

Nuclear power plants generate approximately 20% of the electricity consumed in the United States each year. The fuel for these plants is fabricated from low enriched uranium ("LEU"), which typically is produced through a process of enrichment. Enrichment involves increasing the level of fissionable $U_{235}$ from 0.711% (the percentage by weight found in natural uranium) to levels that will sustain a chain reaction needed to generate electricity (generally 3-5%). Uranium in which the $U_{235}$ content has been enriched to a level of 20% or more is weapons-grade material and is referred to as "highly enriched uranium" or "HEU."

The United States has only one plant in operation that produces LEU for nuclear fuel. This plant is owned by the U.S. government and operated by USEC pursuant to a lease entered into under the terms of the USEC Privatization Act of 1996, 42 U.S.C. § 2297h.

Companies that produce LEU such as USEC and the French company in this case, Eurodif S.A., are called "enrichers." Transactions between enrichers and their utility customers generally involve one of two types of contracts: "EUP" contracts (or "enriched uranium product" contracts) or "SWU" contracts ("separative work unit" contracts). There is no difference in the LEU that is produced and delivered to the customer in the two transactions.

In an EUP transaction, the utility contracts for the delivery of LEU and pays a cash price that covers the entire value of the LEU. There is no dispute that LEU imports pursuant to EUP contracts involve sales of merchandise subject to the antidumping law.

In a SWU transaction, the utility also contracts for the delivery of LEU, but pays cash and delivers raw material (natural, or "unenriched," uranium) to the enricher. There is no requirement in the contract that the LEU be produced from the unenriched uranium delivered by the customer. Because of the nature of the production process[2] and the fact that natural uranium is fungible and is not physically segregated by the enricher according to who supplied it, the LEU delivered to a customer is not produced from the batch of natural uranium delivered by that customer. Enrichers continuously produce LEU from their fungible inventory of unenriched uranium, and the LEU delivered by an enricher may have been produced even before the utility provided any natural uranium pursuant to its contract or even before the order for the LEU was placed. App. 49a, 219a.

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2. Both USEC and Eurodif use the gaseous diffusion method for producing LEU. Their plants are among the largest industrial plants in the world. The gaseous diffusion process involves continuously forcing and recycling uranium hexafluoride gas under pressure through more than 1,000 cascades, each of which contains porous membranes or diaphragms. As $U_{235}$ molecules are lighter than the $U_{238}$ molecules that are also contained in uranium as it comes out of the ground, the process results in two streams of gas, one slightly enriched in $U_{235}$ and one that is somewhat depleted in $U_{235}$. *See* World Nuclear Ass'n, Information Paper: Uranium Enrichment (Oct. 2007), http://www.world-nuclear.org/info/inf28.html.

## III. THE PROCEEDINGS BELOW

### A. The Commerce Proceedings

On December 21, 2001, following a year-long antidumping investigation, Commerce published a notice of final determination regarding LEU from France. *Low Enriched Uranium from France*, 66 Fed. Reg. 65,877 (Dep't of Commerce Dec. 21, 2001) (App. 41a), *as amended*, 67 Fed. Reg. 6,680 (Dep't of Commerce Feb. 13, 2002) (App. 90a) (collectively "Final Determination"). In its Final Determination, the Department found that LEU from France was being sold, or was likely to be sold, in the United States at less than fair value. In addition, the U.S. International Trade Commission determined that the domestic uranium enrichment industry was being injured or was likely to be injured by the foreign imports. As a result of these determinations, Commerce issued an antidumping duty order with regard to imports of French LEU. The Department calculated an antidumping duty rate of 19.95 percent.[3]

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3. At the same time Commerce also issued an affirmative countervailing duty determination (*i.e.*, a determination regarding subsidies provided by foreign governments to the production of the imported merchandise) involving LEU from France, as well as affirmative countervailing duty determinations involving LEU produced by another foreign enricher and imported from Germany, the Netherlands, and the United Kingdom. While the initial appeals involved those countervailing duty determinations as well as the antidumping duty determination on LEU from France, the countervailing duty orders have either been revoked or are not at issue here.

The central issue in the antidumping proceeding before Commerce, and in the subsequent appeals to the U.S. Court of International Trade (CIT) and Federal Circuit, was whether LEU imports pursuant to SWU transactions constituted sales of merchandise, subject to the antidumping law, or sales of services, outside the scope of that law.

Commerce concluded that all LEU entering the United States from France was subject to the antidumping law "regardless of the way in which the sales for such merchandise were structured," App. 47a, 54a, and that this conclusion furthered Congress's intent in enacting the antidumping law. App. 63a.

Commerce found that enrichment accounts for 60% of the value of the LEU, and that it substantially transforms the unenriched uranium, thereby creating a "new and different article of commerce." App. 62a-63a. The Department also noted that imports under either form of contract involve trade in goods, and that exclusion of imports pursuant to "contract manufacturing" from the scope of the antidumping law would have "profound implications for the international trading system as a whole" by enabling parties to convert "trade in goods into trade in so-called 'manufacturing services'. . . . We simply do not consider a major manufacturing process to be a 'service' in the same sense that activities such as accounting, banking, insurance, transportation and legal counsel are considered by the international trading community to be services." App. 63a-64a. The Department found that the overall arrangements in both EUP and SWU transactions involved the sale of LEU and that "[i]n reaching this

conclusion, we have looked beyond the four corners of the contract and have examined the totality of the circumstances surrounding the transactions. . . ." App. 80a.

Accordingly, the antidumping order applied to all imports of LEU from France, including imports pursuant to SWU contracts.

### B. CIT Review and Commerce's Redetermination

Eurodif S.A., the foreign enricher in this case, contested Commerce's Final Determination before the Court of International Trade. Eurodif argued that the importation of LEU pursuant to SWU transactions involved sales of services outside the scope of the antidumping law. Its arguments were based, in part, on Commerce's "tolling" regulation, 19 C.F.R. § 351.401(h) (2007). A tolling arrangement is one in which the tollee provides raw materials to the toller, who produces finished merchandise that is delivered to the tollee. The regulation provides guidance as to which entity's prices and costs (*i.e.*, the toller's or the tollee's) will be examined in determining whether dumping has occurred.

The CIT agreed with Commerce that the tolling regulation does not exempt imported merchandise from antidumping proceedings. *USEC Inc. v. United States*, 259 F. Supp. 2d 1310, 1325 (Ct. Int'l Trade 2003) (App. 131a). Nevertheless, the CIT remanded the case to Commerce for reconsideration of how the tolling regulation affected the Department's conclusion that transactions under SWU contracts involved a sale of goods, not services.

On remand, the Department considered both the tolling regulation and its prior precedent, and reexamined the extensive evidence of record regarding how SWU transactions were actually implemented. *Final Remand Determination, USEC Inc. v. United States* (Dep't of Commerce June 23, 2003) (App. 147a). The Department found that these transactions involve "the transfer of ownership [from the enricher to the utility] in the complete LEU product for consideration," App. 217a, and constituted a sale of merchandise. App. 219a-220a. Commerce explained that the enricher "hold[s] inventories of uranium from various sources, including uranium owned by the enricher itself, and produce[s] LEU without relying solely upon the input from a particular customer." App. 221a. Commerce found that the enricher, not the customer, owns the LEU from the time it is produced until the time it is delivered "because the LEU produced by the enricher cannot be identified as having been derived from the feedstock provided by any particular customer." App. 219a. Further,

> the record indicates that LEU delivered to a utility customer by an enricher under an enrichment contract may be produced before any natural uranium supplied by that customer could have been part of the production process for that LEU, thereby making it impossible to conclude that the LEU produced and delivered by the enricher is in any way derived from the uranium supplied by the customer.

*Id.* Based on these factors, Commerce concluded that the delivery of LEU pursuant to SWU transactions involves a sale of merchandise subject to the antidumping law. App. 222a.

The CIT, on review, rejected the Department's conclusion. *USEC Inc. v. United States*, 281 F. Supp. 2d 1334 (Ct. Int'l Trade 2003) (App. 268a). Focusing exclusively on the provisions of the SWU contracts, rather than the total evidence of record considered by the Department, the CIT found that the contracts create a "legal fiction" that the natural uranium delivered by the utility is enriched by the enricher and returned as LEU to the utility, and "suggest an intention to establish a continuous chain of ownership in the utility. . . ." App. 277a. In the CIT's view, regardless of the facts of the enrichment process and how SWU transactions are implemented, "the contracts delineate a transaction in which a utility provides raw material to an enricher, pays for the service of processing the material, and obtains the finished product after the manufacturing service has been performed." App. 278a.

### C. Federal Circuit Decisions on Interlocutory Review

The parties then sought and obtained an order from the CIT permitting an interlocutory appeal to the Federal Circuit pursuant to 28 U.S.C. § 1292(d)(1). *USEC Inc. v. United States*, 27 C.I.T. 1925 (2003) (App. 306a). The Federal Circuit granted the interlocutory appeal and affirmed the CIT's decision. *Eurodif S.A. v. United States*, 411 F.3d 1355, 1361-64 (Fed. Cir. 2005) ("*Eurodif I*") (App. 11a-21a).

In evaluating what it referred to as "[t]he [c]haracterization of [e]nrichment [c]ontracts," App. 12a, the Federal Circuit placed central reliance on a previous case in which the court was called upon to characterize

U.S. Government SWU contracts under a different statute, the Contract Disputes Act (CDA), 41 U.S.C. § 601, *et seq.* (1988), to determine whether interest was payable on certain judgments against the United States, *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002). In that case, the court had agreed with the government's argument that contracts for the enrichment of uranium by the Department of Energy were service contracts not covered by the CDA. App. 15a-16a. The court below extended *Florida Power's* contract-based approach to this case. In its view, "the contracts in this case" made clear that ownership of neither the natural uranium nor the LEU was "meant to be vested in the enricher during the relevant time periods that the uranium is being enriched." App. 15a. "As a result, the 'transfer of ownership' required for a sale under [*NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997)] is not present here." App. 15a.

USEC and the United States then sought rehearing and rehearing *en banc*, in part based on the court's improper reliance on *Florida Power* as a basis for failing to defer to Commerce's construction of the antidumping statute. Subsequent to those filings, this Court handed down its decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), which clarified that a court must defer to an agency's construction of a statute even if the court had reached a different interpretation in a prior judicial decision unless that prior decision had found that the statute compelled the court's interpretation. *Id.* at 982-85. USEC and the United States brought this decision to the attention of the court in a Rule 28(j) letter. *See* Fed. R. App. P. 28(j). The Federal Circuit denied rehearing *en banc*, but granted rehearing for the limited purpose of addressing the

applicability of the *Brand X* decision. While acknowledging that under *Brand X* deference would be due to Commerce if the antidumping statute were ambiguous, the court stated, "We now clarify ... that the antidumping statute unambiguously applies to the sale of goods and not services." *Eurodif S.A. v. United States*, 423 F.3d 1275, 1278 (Fed. Cir. 2005) ("*Eurodif II*") (App. 28a).

### D. Proceedings on Remand from the Federal Circuit

Following remand to Commerce, *Eurodif S.A. v. United States*, 414 F. Supp. 2d 1263 (Ct. Int'l Trade 2006) (App. 317a), Commerce stated that it would not assess antidumping duties on imports under SWU transactions. It concluded, however, that it need not amend the scope of the antidumping order because LEU imported pursuant to SWU transactions is physically indistinguishable from imports of LEU pursuant to EUP transactions that would continue to be covered by the order. Rather, in future administrative reviews it would examine the facts of record regarding particular imports and apply the Federal Circuit decisions to those imports. *Low Enriched Uranium from France*, (Dep't of Commerce March 3, 2006) (final results of redetermination) (App. 320a).

On appeal, the CIT rejected Commerce's approach and ordered it to modify the scope of the antidumping duty order to exclude all entries of French LEU imported pursuant to SWU transactions. *Eurodif S.A. v. United States*, 431 F. Supp. 2d 1351 (Ct. Int'l Trade 2006) (App. 327a).

Commerce then adopted language limiting the scope of the antidumping order, while continuing to note its disagreement with both the Federal Circuit's decisions in *Eurodif I* and *II* and the CIT's rejection of its first redetermination. It also specified a form by which the French enricher and U.S. utility customer could certify that particular imports met the conditions for exclusion from the order. *Low Enriched Uranium from France*, (Dep't of Commerce June 19, 2006) (final results of redetermination). (App. 340a).

### E. Final Federal Circuit Decision

Following the CIT's affirmance of Commerce's second redetermination, *Eurodif S.A. v. United States*, 442 F. Supp. 2d 1367 (Ct Int'l Trade 2006) (App. 356a), the United States and USEC again appealed to the Federal Circuit. The United States argued that the CIT had erroneously rejected Commerce's first redetermination approach. USEC argued that the determination whether particular imports of LEU were excludable from the order pursuant to the Federal Circuit's earlier decision should be affected by certain additional factors, *e.g.*, whether an affiliate of the enricher supplied the unenriched uranium in the transaction and whether the unenriched uranium was delivered to the enricher after the delivery of the LEU to the utility customer. The Federal Circuit concluded that both appeals raised issues that could best be resolved when particular facts were at issue, and dismissed the appeals as unripe. *Eurodif S.A. v. United States*, 506 F.3d 1051 (Fed. Cir. 2007) (App. 31a).

With the Federal Circuit's dismissal of the appeals, the Federal Circuit's interlocutory decisions in *Eurodif I* and *Eurodif II* have now become incorporated in a final judgment. Absent review by this Court, those decisions will become the governing law regarding the dividing line between trade in goods that are subject to the antidumping law and trade in services that are outside the scope of the antidumping law.

### F. Proceedings Regarding Imports of Russian LEU

The impact of the Federal Circuit's decisions is already being felt in another important antidumping case. It is one that has significant implications for the continued successful implementation of a bilateral program for the importation of Russian LEU derived from the dismantling of nuclear weapons of the former Soviet Union. The case involves an antidumping investigation into uranium imported from Russia that was suspended in 1992 as a result of an agreement between the United States and Russia. The agreement currently limits imports of Russian LEU but permits the importation of LEU that has been produced through a process of down-blending the highly enriched uranium in the weapons material with uranium with a much lower $U_{235}$ content. In the pending case, Commerce has conducted a sunset review and concluded that terminating the suspension agreement would likely lead to the continuation or recurrence of dumping. *Uranium from the Russian Federation*, 71 Fed. Reg. 32,517 (Dep't of Commerce June 6, 2006).

On September 27, 2007, however, in light of the Federal Circuit's decisions in *Eurodif*, the CIT remanded that determination and directed Commerce to exclude future imports of Russian LEU pursuant to SWU transactions from the scope of that case. *Techsnabexport v. United States*, 515 F. Supp. 2d 1363 (Ct. Int'l Trade 2007). On December 21, 2007, Commerce filed the results of its remand with the CIT. In its remand results, Commerce applied the *Eurodif* precedent, and concluded based on the specific facts in that review that dumping would likely continue or recur if the suspended investigation were terminated. Other parties in the case, including an association of U.S. utilities and the Russian exporter of LEU, have filed comments with the Court of International Trade urging the court to expressly direct Commerce to explicitly exclude all imports of Russian LEU pursuant to SWU contracts from the case. The court has not yet ruled on Commerce's remand determination.

## REASONS FOR GRANTING THE PETITION

The Federal Circuit's decisions improperly narrow the scope of the antidumping statute. They significantly limit the protection that law was meant to afford to domestic producers from injurious, unfairly priced imports. Because of the Federal Circuit's exclusive role in the appellate review of antidumping cases, its decisions will conclusively decide the question presented absent review by this Court.

The antidumping statute clearly applies to sales of merchandise, but it does not define when merchandise is "sold." In particular, Congress has not "directly spoken

to the precise question at issue" in this case: whether the statute encompasses import transactions where the U.S. customer supplies cash and raw materials to the foreign producer and the foreign producer delivers a substantially transformed finished product. In this circumstance, the Federal Circuit's failure to defer to Commerce's reasonable construction of the statute is fundamentally inconsistent with *Chevron*, 467 U.S. 837.

The Department considered the language and purpose of the antidumping law and examined the "totality of the circumstances" to determine that the import transactions in this case constitute sales of merchandise under the antidumping statute. The reasonableness of that construction is illustrated by cases interpreting other regulatory statutes applying to the "sale" or "purchase" of goods, where courts have interpreted such terms broadly—looking beyond the formalities of the contract—to effectuate the regulatory purposes of the statute at issue. Moreover, Commerce's approach to the dividing line between what constitutes a transaction involving goods, rather than one involving services, is consistent with how Congress has drawn that line in another trade statute. *See* 19 U.S.C. § 2114b(5) (defining "services" as "economic activities whose outputs are other than tangible goods" for purposes of delineating the U.S. Trade Representative's authority for negotiating international agreements on trade in services).

Rather than deferring to the Commerce Department's reasonable construction of the antidumping law, the Federal Circuit placed significant weight on its own characterization of U.S. government SWU contracts in *Florida Power*, a case that arose under a different statute with a different

purpose. The court's approach would remove imported merchandise from the scope of the antidumping law based solely on the manner in which the parties choose to structure their transaction—a result that the Commerce Department reasonably concluded could not have been intended by the Congress.

Finally, the Federal Circuit's decisions are having a significant impact beyond the immediate case. By removing antidumping constraints on LEU imports when SWU contracts are employed, the Federal Circuit's decisions jeopardize conditions of fair pricing in the U.S. LEU market. This in turn threatens the continued successful implementation of a historic agreement between the United States and Russia for the importation of LEU down-blended from nuclear weapons of the former Soviet Union. In addition, by removing legal constraints on unfairly priced LEU imports, the decision also threatens market disruption that could undermine the viability of the only operating U.S. enrichment plant, and jeopardize initiatives to expand U.S. capacity to produce enriched uranium. Such initiatives include a multi-billion dollar project now being deployed by USEC at U.S. government facilities pursuant to agreements with the Department of Energy using the only advanced U.S. enrichment technology available to meet future U.S. defense needs.

## I. THE COMMERCE DEPARTMENT REACHED A REASONABLE CONSTRUCTION OF AN AMBIGUOUS STATUTORY PHRASE.

This petition presents a classic example of the trouble that a federal appellate court can cause when it fails to follow the basic framework of *Chevron*. Under that decision, the court must first determine whether the Congress has "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If not, then the court must "not simply impose its own construction on the statute as would be necessary in the absence of administrative interpretation," but must defer to a "permissible construction of the statute" by the agency. *Id.* at 843 (citation omitted); *see National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction . . . even if the agency's reading differs from what the court believes is the best statutory interpretation."). Here, the Federal Circuit failed to follow this fundamental principle.

### A. Congress Has Not Directly Spoken to the Question Presented in This Case.

The antidumping law does not define the terms "merchandise" or "sold," and Congress has not spoken directly to the precise question at issue here. There is no explicit congressional guidance as to whether the phrase "foreign merchandise . . . sold" includes transactions such as the ones at issue here: where the U.S. customer supplies cash and raw materials to the

foreign producer and the foreign producer delivers a substantially transformed finished product.

In *Eurodif II*, the Federal Circuit concluded that "the antidumping statute unambiguously applies to the sale of goods and not services." App. 28a. But this conclusion missed the central point. No one contests that the statute applies to the sale of goods and not services. The question is what "sale of goods" (or, more precisely, "merchandise . . . sold") means, and whether that phrase encompasses transactions like the ones at issue in this case. On that issue the statute is ambiguous.

This Court has previously held that analogous statutory terms were ambiguous. For example, this Court has concluded that whatever the term "sale" may mean in other contexts, its meaning in the Securities Exchange Act of 1934 was not unambiguous and required an examination of the Act's purpose and its relation to the particular conduct at issue. *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 466-67 (1969). As the circuit courts have similarly observed, "[t]he phrase 'any purchase and sale' . . . is . . . not to be limited or defined solely in terms of commercial law of sales and notions of contractual rights and duties." *Bershad v. McDonough*, 428 F.2d 693, 696-67 (7th Cir. 1970) (collecting cases). "'Whatever the terms "purchase" and "sale" may mean in other contexts,' they should be construed in a manner which will effectuate the purposes of the specific section of the Act in which they are used." *Id.* (quoting *SEC. v. Nat'l Sec., Inc.*, 393 U.S. at 467 (alteration in original omitted)).

This is consistent with a more general principle: "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). "[W]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at, not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.'" *Dist. of Columbia v. Carter*, 409 U.S. 418, 420 (1973) (quoting *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 258 (1937)).

### B. Commerce's Construction of the Antidumping Statute Was Reasonable.

Given the antidumping statute's silence as to how the phrase "merchandise . . . sold" should be applied where a customer supplies raw materials to a foreign producer and in exchange receives a finished product, Commerce appropriately considered the statute's underlying purpose and the totality of the circumstances relating to the SWU transactions. On that basis it reasonably concluded that, like imports of identical LEU under EUP contracts, LEU imports pursuant to SWU transactions involved a sale of merchandise. Commerce's approach in this regard was consistent with precedent in other regulatory settings where agencies and reviewing courts had to determine if a "sale" subject to

the regulatory statute had taken place, and other indicia of how Congress wants the line drawn in international commerce between what constitutes trade in goods and what constitutes trade in services.

### 1. The Term "Sale" Has Been Broadly Construed When Used in Regulatory Statutes.

Many regulatory statutes apply to "sales" of goods between contracting parties. In interpreting the reach of such statutes, regulatory agencies and courts have looked beyond the contract language to determine whether a "sale" or "purchase" subject to the regulatory regime has taken place, and have given due regard to the realities of the transaction at issue and the purpose of the underlying statute.

For example, in *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 392-400 (1965), the Court held that the phrase "sale in interstate commerce of natural gas" in the Natural Gas Act applied to a transaction in which the pipeline company did not purchase natural gas, but rather leased gas fields and arranged for the production of gas by another company. Because there was no transfer of title to the gas, the pipeline claimed there was "no sale." Nevertheless, this Court upheld the Federal Power Commission's decision that the Natural Gas Act applied. It found that the transaction was "very close in economic effect to conventional sales of natural gas," *id.* at 396. The Court stressed the importance of not undermining a regulatory

act's scope by applying overly technical interpretations of "sale" under local law:

> Without impugning in any way the good faith and genuineness of the transactions, we think it clear that the lease-sales here in question can nonetheless be considered "sales" of natural gas in interstate commerce for purposes of the Act. A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law.

*Id.* at 400 & n.7. The Court further stressed the need to interpret statutory terms "by reference 'to the purpose of the Act and the facts involved in the economic relationship' rather than exclusively by reference to common law standards or local law." *Id.*

The Court in *United Gas Improvement* relied on the "closely analogous" case of *Gray v. Powell*, 314 U.S. 402 (1941). In *Gray*, a railroad leased coal mines, mined the coal using a contractor, and then consumed the coal in its own operations. The railroad argued that it was not subject to the price controls of the Bituminous Coal Act of 1937 because there had been no "sale or other disposal" of coal within the meaning of the Act. Specifically, the railroad pointed out that, "as lessee of the mineral rights [the railroad] is the owner of the coal when it is extracted and until it is consumed and therefore no title ever passes" from the independent contractor to the railroad. The Court rejected this focus on title as the basis for identifying a "sale or other disposal" of goods, holding that "the purpose of Congress,

which was to stabilize the industry through price regulation, would be hampered by an interpretation that required a transfer of title, in the technical sense, to bring a producer's coal, consumed by another party, within the ambit of the coal code." 314 U.S. at 416.[4]

Indeed, courts have found a sale of goods for regulatory purposes even where there was no delivery of goods at all. In *Callery Properties v. FPC*, 335 F.2d 1004, 1021 (5th Cir. 1964), the court held that the Federal Power Commission could find a sale of natural gas based on payments under take-or-pay contract provisions even when no natural gas was delivered. "When viewed realistically in light of the imperative necessity for long term gas supply commitments, we agree with the Commission that this arrangement constitutes a sale within its power of regulation." The Supreme Court later expanded the relief granted, but did not disturb the ruling on the scope of "sale." *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223 (1966).

Just as the agencies in those cases, Commerce here looked to the purpose of the antidumping statute and the characteristics of the transactions in concluding that a sale of merchandise occurred. As Commerce concluded in its Final Determination, "Congress did not intend the [antidumping] and [countervailing duty] laws to be applicable to merchandise based upon the way in which parties structure their transactions. . . ." App. 65a.

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4. In addition, the Court rejected the railroad's claim that it was the "producer" of the coal within the meaning of the Act's exemption for coal "'consumed . . . by the producer'": "To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry." *Gray*, 314 U.S. at 413.

These cases show that, in order to assure the effectiveness of a regulatory scheme, this Court has found a sale of goods even when there was no contractual transfer of title to the goods. Similarly, here Commerce reasonably could conclude that application of the antidumping law should not be undermined by the "legal fiction" in the parties' contracts that the customer retains title to a quantum of raw material until it receives the LEU. Commerce's conclusion is particularly reasonable in light of the facts found by the Department (and not disputed by the CIT or Federal Circuit):

- the enricher produces a new and substantially transformed product (LEU) from commingled fungible unenriched uranium (App. 62a-63a, 69a, 218a);

- the LEU is not produced from the raw material delivered by the customer—and may even have been produced *before* the customer delivered the unenriched uranium (App. 219a); [5] and

- from the time of production through the time of delivery of the imported LEU to the customer, no customer could claim ownership of the delivered LEU (App. 219a).

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5. Indeed, there is no requirement under a SWU contract that the enricher produce *anything* in response to the customer's order. An enricher may fill the order with LEU produced in the past or with LEU obtained from third parties, as is the case with USEC's delivery of Russian LEU down-blended from nuclear weapons of the former Soviet Union. This further indicates that the object of the transaction is not a service to be performed by the enricher on the customer's property, but rather the supply of LEU by the enricher—the same object as in the case of an EUP contract.

Thus, even in light of the definition of sale in prior Federal Circuit case law—"a transfer of ownership to an unrelated party and consideration," *NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir. 1997)—a "sale" could reasonably have been found here. Certainly, under the broad view of "sale" taken by this Court and the regulatory precedents cited, the Department's construction was permissible.

### 2. Commerce's Construction of the Antidumping Law Is Consistent With the Line Congress Has Drawn Between "Goods" and "Services" in a Relevant Trade Statute.

The proper interpretation of a law may be affected by a later enacted statute not directly amending the statute at issue. *See, e.g., United States v. Fausto*, 484 U.S. 439, 453 (1988) ("This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute."). That principle of interpretation is relevant here.

An indication of congressional intent as to the dividing line for international trade purposes between trade in services and trade in goods is the provision of U.S. trade law, enacted in 1984, that authorizes the U.S. Trade Representative to negotiate trade agreements covering services. 19 U.S.C. § 2114a. It defines "services" as "economic activities whose outputs are other than tangible goods." *Id.* § 2114b(5). Congress's view that an economic activity resulting in the output of a tangible

good does not constitute a "service" for international trade purposes further supports the reasonableness of Commerce's interpretation that SWU transactions—which unquestionably involve the production and importation of a tangible good—do not constitute the provision or sale of a service.

Indeed, the Federal Circuit's ruling creates a gap in Congress's allocation of responsibilities for international trade matters. The USTR has authority to negotiate trade agreements covering "services," which § 2114b(5) defines as not including economic activities whose outputs are tangible goods. As that definition makes clear, this authority covers such traditional services as banking, insurance, and advertising, but plainly does not cover manufacturing or processing that yields a tangible good, whether it is enriched uranium, a sophisticated computer chip, or a machine tool. Thus, the Federal Circuit has created a situation in which some key economic activities that result in imports into the United States are *neither* subject to the Commerce Department's jurisdiction under the antidumping law as sales of goods *nor* subject to the authority of the USTR to negotiate rules covering such imports under international agreements relating to services.

### C. The Federal Circuit Departed From the Teachings of *Chevron* and *Brand X*.

Rather than deferring to Commerce's reasonable construction of the phrase "merchandise . . . sold" in the antidumping statute, the Federal Circuit focused on how the court itself had characterized SWU transactions in its own *Florida Power* decision. In that case, the court

was presented with the question of whether SWU contracts between the Department of Energy and U.S. utilities should be considered sales of goods or sales of services under the Contract Disputes Act, 41 U.S.C. § 601, *et seq.* (1988). The court found that the transactions had aspects of both categories: "In light of the evidence that DOE used feed material from other customers, and sometimes its own feed material, to fulfill a particular . . . order of enriched uranium, *this case does not fall neatly into either the above categories. . . .*" *See Florida Power & Light Co. v. United States*, 307 F.3d 1364, 1373 (Fed. Cir. 2002) (emphasis added).

Despite its recognition in *Florida Power* that SWU transactions do not "fall neatly" on either side of the goods/services divide, the Federal Circuit in *Eurodif I* treated this issue as having been decisively resolved: "Holdings of this court are no less decisive because they may have been difficult to develop." App. 17a. But that very "difficulty" in characterizing the DOE SWU contracts reflects ambiguity—precisely the sort of ambiguity that, when applied to this case, should have signaled to the court its duty to defer to Commerce's reasonable construction. But, on rehearing, the Federal Circuit nevertheless insisted that its decision in *Florida Power* was entitled to persuasive weight.[6]

The court's reliance on *Florida Power* was improper for two fundamental reasons. First, *Florida Power* interpreted an entirely different statute—the Contract Disputes Act. That statute is focused on delineating the rights of the parties to the contract relative to each other.

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6. *See Eurodif II*, at App. 28a (noting that in *Eurodif I* the court had found *Florida Power* to be "persuasive" authority).

*See Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 805 (2003) ("The CDA establishes rules governing disputes arising out of certain Government contracts."). This case, however, involves the Commerce Department's construction of the antidumping statute, the purpose of which is to protect *nonparties* to the import contracts—domestic producers that must compete with imports from foreign producers. In this context, contract provisions cannot be given dispositive weight. Given the starkly different purposes of the statutes at issue in *Florida Power* and here, reliance on that case was unwarranted.[7]

Second, even if *Florida Power* had interpreted the antidumping statute, its conclusion could not justify the court's refusal to give deference to Commerce's reasonable interpretation of the statute unless it was clear that Congress had unambiguously intended that imports pursuant to SWU transactions do *not* constitute sales of LEU. "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency

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7. For much the same reason, court decisions addressing commercial disputes between the parties to a contract are not relevant here. In that context, in declaring the relative rights of the parties, the court may properly seek to give effect to the intentions of the parties as reflected in the language of their contract. In addition, there is no agency application of a statute to be considered. Those cases are not determinative of how a transaction should be characterized under a regulatory regime where the interests of third parties are implicated and an expert agency has been designated to implement the statute.

discretion." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). The court of appeals plainly expressed its unwillingness to "ignore our previous holdings" because of the factual similarities of the underlying transactions. App. 28a, *citing to* App. 17a. But that is precisely what it must do under *Brand X*. *See id.* (court must approach inquiry as if it were "reviewing the agency's construction on a blank slate"); *see also Skranak v. Castenada*, 425 F.3d 1213, 1220 (9th Cir. 2005) (under *Brand X*, a court reviews subsequent agency determination as if it had "never addressed the topic"). Since *Brand X* would have required the Federal Circuit to take a "blank slate" approach even if its earlier decision had interpreted the antidumping statute, the Federal Circuit's reliance on *Florida Power*—which arose under a completely different statute—is even less appropriate.

In short, the Federal Circuit's decisions in *Eurodif I* and *II* fail to follow the teachings of *Chevron* and *Brand X*. The court concluded that a transaction it deemed to be a sale of a service under one statute cannot be a sale of merchandise under an entirely different statute unless Congress specifically says it is. This conclusion is contrary to repeated instruction from this Court that the same words used in different statutes, or even in different parts of the same statute, can have different constructions depending upon the purposes of the law. *See, e.g., Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423, 1433-34 (2007); *United States v. Cleveland Baseball Co.*, 532 U.S. 200, 213 (2001); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). Moreover, the Federal Circuit's approach places a burden of explicit statement on Congress when

it has entrusted application of the second statute to an expert agency with knowledge of complex industry arrangements. And the Federal Circuit reached this conclusion despite the two statutes' very different terms and entirely different purposes; despite the role of the Commerce Department in interpreting the antidumping law; and despite the fact that the court in *Florida Power* itself found the characterization of such contracts to be a close question even under the Contract Disputes Act.

## II. THIS CASE PRESENTS AN ISSUE WITH IMPORTANT NATIONAL IMPLICATIONS.

The Federal Circuit's decisions have important implications for U.S. trade law, for national security, for our nation's energy policy, and for jurisprudential principles of deference to Executive Branch agencies. Any of these implications alone would warrant this Court's granting certiorari. That all of these factors are present here makes this case especially worthy of this Court's consideration.

First, this case involves the basic question: what is a sale of merchandise covered by the antidumping statute? This question is central to the jurisdiction of the Commerce Department and the scope of protection afforded domestic industries by that law. Because of the pivotal importance of this question, it was certified to the Federal Circuit, which issued two opinions attempting to address it. The Federal Circuit's rulings have the potential to create a significant loophole in the antidumping law that would exclude import transactions from the scope of that law based on how the contracts are structured. Arrangements for contract manufacturing are prevalent throughout industry—and will certainly become more prevalent in import transactions if the Federal Circuit's decisions are not reversed.

Second, application of the Federal Circuit's ruling to LEU has important implications for national security, as it endangers the continued successful implementation of a 1993 agreement between the United States and Russia for the dilution (or "down-blending") of weapons material and sale of the resulting LEU in the United States.[8] In that agreement (commonly known as the "Megatons to Megawatts" program), Russia agreed to sell 500 metric tons of highly enriched uranium converted to LEU over a period of twenty years. Under the agreement, USEC, as U.S. executive agent, each year purchases the down-blended LEU in amounts equal to approximately one-half of the annual U.S. consumption for LEU, and ten percent of total U.S. electricity consumption.

In doing so, USEC assumes all risk associated with the sale of the down-blended LEU, including the risk of maintaining a sufficiently large backlog of SWU and EUP contracts to absorb both the large quantity of down-blended LEU and the roughly equal amount of LEU that USEC produces in Kentucky, at the sole remaining U.S. uranium enrichment plant. The revenues from these contracts are used to pay for the LEU imported under the HEU Purchase Agreement, as well as the cost and upkeep of the domestic LEU plant and investment in a project (discussed below) to deploy new U.S. uranium enrichment technology that is critical to U.S. national and energy security.

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8. Agreement Concerning the Disposition of Highly Enriched Uranium Extracted From Nuclear Weapons, U.S.–Russ., Feb. 18, 1993, Temp. State Dep't No. 93-59, 1993 WL 152921 [hereinafter "HEU Purchase Agreement" or "Megatons to Megawatts"].

As of December 31, 2007, there remain approximately 178 metric tons of Russian HEU—equivalent to approximately 7,000 nuclear warheads—to be down-blended and sold in the United States. This represents approximately 35% of the total amount of weapons material to be down-blended under the program. Absent measures to restrain dumping of LEU imports, completion of the program is at risk.

In addition to producing LEU by down-blending the highly enriched uranium in nuclear warheads, Russia has significant capacity, through four large enrichment plants, to produce LEU from natural uranium far in excess of its domestic needs. If this Russian LEU can be imported into the United States outside the scope of the antidumping law, it would disrupt the market conditions needed to ensure the continued success of the weapons dismantling program, since imports of commercially-produced LEU at dumped prices would undermine USEC's ability to sell the down-blended Russian LEU.

The U.S. government has been able to maintain the necessary market conditions for the success of the Megatons to Megawatts program because of a 1992 agreement with Russia (referred to as the "Russian Suspension Agreement") that suspended an antidumping investigation on imports of uranium from Russia, including imports of LEU. That agreement permits imports of Russian LEU under the Megatons to Megawatts program, and pursuant to an amendment signed on February 1, 2008, will permit very limited

imports of commercial LEU under annual quotas.[9] However, if the loophole created by the Federal Circuit in this case is not corrected, the ability to enforce those quotas will be undermined. Since the Russian Suspension Agreement is predicated upon the antidumping law, unless the *Eurodif* loophole is closed Russia will be able to export unlimited quantities of LEU pursuant to SWU transactions over and above any quotas established in the Russian Suspension Agreement. Failure to correct this loophole would thus leave the U.S. government without the means to ensure that the market remains favorable to full implementation of the Megatons to Megawatts program.

Moreover, the Court of International Trade has concluded that, in light of the *Eurodif* decisions, imports of Russian LEU under SWU contracts cannot be subject to the antidumping law. *Techsnabexport v. United States*, 515 F. Supp. 2d 1363 (Ct. Int'l Trade 2007). Because the Federal Circuit's *Eurodif* decisions have been treated as controlling in the Russian proceeding, their foundations have not been reexamined in that case. Accordingly, this case alone provides a complete record for review of the statutory interpretation issue affecting both proceedings.

Third, USEC is currently seeking to finance and deploy a new multi-billion dollar enrichment plant under its 2002 Memorandum of Understanding with the United

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9. The amendment to the Russian Suspension Agreement is reproduced at 73 Fed. Reg. 7705 (Feb. 11, 2008).

States Department of Energy.[10] Removal of the protections that the antidumping law provides against unfairly priced LEU imports could undermine that endeavor. It would also threaten the viability of the existing U.S. enrichment plant. This could further increase the United States' dependence on foreign sources of energy at a time when energy independence is increasingly regarded as a vital aspect of economic and national security. Moreover, both USEC's new plant and its existing plant employ the only uranium enrichment technologies available to meet U.S. defense needs. Other enrichment plants that are being developed or under consideration would employ foreign enrichment technologies, which are subject to restrictions that render them unavailable for the defense needs of the United States military.

Finally, this case raises broader jurisprudential issues regarding lower courts' adherence to the principles set forth by this Court in *Chevron* and in *Brand X*. Those principles require due regard for Executive Branch functions and respect for expert agency determinations when construing and applying critical terms like "sale" in regulatory regimes created by Congress.

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10. *See* Press Release, USEC, "USEC and U.S. Energy Department Sign Accord" (June 18, 2002), *available at* http://www.usec.com/v2001_02/Content/News/NewsTemplate.asp?page=/v2001_02/Content/News/NewsFiles/06-18-02.htm.

## CONCLUSION

Few international trade cases have the manifest importance of this one. On this rare occasion when a trade law decision implicates such significant national policies, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

# APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED MARCH 3, 2005

## UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Nos. 04-1209, 04-1210

EURODIF S.A., COMPAGNIE GENERALE DES MATIERES NUCLEAIRES, and COGEMA, INC.,

Plaintiffs-Appellants,

and

AD HOC UTILITIES GROUP,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Cross Appellant,

and

USEC INC. and UNITED STATES ENRICHMENT CORPORATION,

Defendants-Cross Appellants.

March 3, 2005, Decided

*Appendix A*

## OPINION

**JUDGES:** Before BRYSON, Circuit Judge, PLAGER, Senior Circuit Judge, and PROST, Circuit Judge.

**OPINION BY:** PROST

PROST, *Circuit Judge.*

This interlocutory appeal comes to us from the United States Court of International Trade, which certified four separate questions for appeal to this court. The Ad Hoc Utilities Group ("AHUG"), Eurodif S.A. ("Eurodif"), Compagnie Generale des Matieres Nucleaires ("CGMN") and Cogema, Inc. appeal two issues from the Court of International Trade. The United States, USEC, Inc. and the United States Enrichment Corporation (the latter two collectively referred to as "USEC" in this opinion) cross-appeal two issues. We affirm the Court of International Trade's decision affirming the Department of Commerce's ("Commerce") industry support determination. We also affirm the court's decision that uranium enrichment contracts constitute a provision of services, rather than a sale of goods. Finally we reverse the court's decision regarding subsidies, and hold that overpayment for uranium enrichment services by foreign government entities cannot constitute a countervailable subsidy. Because we need not review the court's decision regarding Commerce's application of the tolling regulation in the context of export price determination, we decline to do so.

*Appendix A*

## BACKGROUND

Enriched uranium fuel rods are used by the utility industry to generate nuclear power. The process of producing those rods involves multiple steps. First, uranium ore must be mined. Second, the ore must be milled or refined into concentrated uranium. Third, that concentrated uranium must be converted into uranium hexafluoride. Fourth, that uranium hexafluoride must be enriched into low enriched uranium ("LEU"). Fifth, and finally, LEU is used to fabricate uranium rods. This case involves the fourth step in the process of creating uranium rods—the enrichment of uranium hexafluoride into LEU.

Many utilities in the United States contract to buy uranium from a third-party seller and then contract to have that uranium enriched by a uranium enricher. Only one entity in the United States enriches uranium into LEU-USEC, formerly an arm of the federal government. A variety of foreign enrichers, including Eurodif, CGMN and Cogema, compete with USEC and also enrich the uranium of American utility companies.[1]

Contracts for enriched uranium come mainly in two different forms. The first form involves contracts that provide money for the sale of enriched uranium, otherwise known as enriched uranium product, or EUP,

1. The Court of International Trade thoroughly documented the factual background to this case in its opinion. *See USEC Inc. v. United States*, 281 F.Supp.2d 1334 (Ct. Int'l Trade 2003) ("*USEC II*").

contracts. The second form, the form relevant to this appeal, involves the transfer of unenriched uranium by a buyer to an enricher and the purchase of separative work units ("SWU") from the enricher. In these SWU contracts, the enricher enriches the unenriched uranium and delivers LEU to the purchaser. Although the enricher may not necessarily produce a particular utility's LEU from the uranium that utility provides to the enricher, the utility retains title, during the enrichment process, to the quantity of unenriched uranium that it supplies to the enricher.

In most of the transactions relevant to this case, AHUG and American utilities entered into SWU contracts with European enrichers. These utilities compensated enrichers to process unenriched uranium into LEU. In another critical transaction, a partially public French utility, Electricite de France ("EdF"), entered into an SWU contract with French enricher Eurodif. In that contract, EdF allegedly paid Eurodif greater than adequate compensation for the enrichment of uranium.

On December 7, 2000, USEC petitioned Commerce to undertake an antidumping and countervailing duty investigation focusing on LEU coming from France, Germany, the Netherlands, and the United Kingdom. On December 21, 2001, Commerce issued its final determinations in that investigation. Those determinations focused on two main issues: (1) whether SWU contracts were contracts for the sale of goods and not services and, therefore, subject to U.S. antidumping

and countervailing duty statutes, and (2) whether domestic utilities or foreign enrichers were "producers" of LEU for the purposes of determining whether or not there was sufficient industry support to begin an antidumping and countervailing duty investigation in the first place. In its final determinations, Commerce concluded that SWU contracts are contracts for the sale of goods and not services. It also decided that the foreign enrichers of uranium, and not the domestic utilities, were "producers" of LEU.

AHUG and the foreign enrichers party to this case appealed Commerce's determination to the Court of International Trade, arguing that a uranium enrichment contract is a contract for the provision of services and not the sale of goods and, therefore, not subject to federal antidumping and countervailable subsidy statutes. AHUG also disputed Commerce's contention that only the foreign enrichers are "producers" for domestic industry support determination purposes, arguing that Commerce's determination that foreign enrichers were "producers" of LEU was inconsistent with its prior decisions. AHUG further contended that if the domestic utilities are considered producers of LEU, Commerce would not have sufficient domestic industry support to commence an investigation pursuant to 19 U.S.C. § 1673a(c)(4).

The Court of International Trade agreed with AHUG and determined that Commerce's characterization of the enrichment contracts between AHUG and foreign enrichers as contracts for the sale of goods was not

sustainable. *USEC Inc. v. United States*, 259 F.Supp.2d 1310, 1324-26 (Ct. Int'l Trade 2003) ("*USEC I*"). It also found that Commerce's determination that the foreign enrichers were "producers" of LEU was against the weight of the evidence and inconsistent with prior Commerce decisions. *Id.* at 1317-26. As a result, the court remanded the case to allow Commerce to reconsider its determinations.

In its remand determination, Commerce reiterated its original positions. *Final Remand Determination, USEC Inc. and United States Enrichment Corp. v. United States* (June 23, 2003) ("*Remand Determination*"). AHUG and the foreign enrichers then appealed that remand determination to the Court of International Trade. In its second consideration of Commerce's determinations, the court concluded that (1) Commerce's interpretation of the word "producer" in the context of making an industry support determination was reasonable and in accordance with law; (2) uranium enrichment contracts were contracts for services and not for goods; (3) payment by a foreign government entity of more than adequate remuneration to a foreign enricher for enrichment services qualified as a countervailable subsidy; and (4) Commerce's interpretation of the word "producer" for the purposes of making an export price determination was inconsistent with its previous determinations in other cases and thus not in accordance with law. *USEC Inc. v. United States*, 281 F.Supp.2d 1334 (Ct. Int'l Trade 2003) ("*USEC II*").

*Appendix A*

Because the resolution of the issues decided by the court in *USEC II* are potentially dispositive of this entire case, the Court of International Trade certified four specific questions for appeal to this court. The four certified questions are:

(1) Whether Commerce's decision not to apply its tolling regulation to determine whether American utilities should be considered "producers" of low enriched uranium (LEU) for the purposes of determining whether there was enough domestic industry support to proceed with an investigation is in accordance with law. (Commerce determined that foreign enrichers and not domestic utilities were "producers" of LEU for the purposes of determining domestic industry support. *Remand Determination* at 6-36.)

(2) Whether Commerce's decision that the enrichment of uranium feedstock pursuant to separative work unit (SWU) contracts constitutes a sale of goods instead of services is supported by substantial evidence and in accordance with law. (Commerce determined that SWU contracts like EUP contracts are contracts for the sale of goods. *Remand Determination* at 70-81.)

(3) Whether Commerce's decision that payment of more than adequate remuneration for enrichment services by partially public foreign entities to foreign enrichers constitutes a countervailable subsidy is in accordance with law. (Commerce determined that the transaction between EdF and Eurodif was a sale of goods to a government entity for more than adequate

remuneration and, therefore, subject to the countervailing duty statute. *Remand Determination* at 82-99.)

(4) Whether Commerce's decision to apply a definition of "producer" in the context of export price determination that is different from the definition it used in the industry support determination is reasonable and therefore in accordance with law. (Commerce determined that foreign enrichers were "producers" of LEU for the purposes of determining LEU export price. *Remand Determination* at 69-70.)

We have jurisdiction to hear this appeal under 28 U.S.C. § 1292(d)(1).

## DISCUSSION

In reviewing the Court of International Trade's decisions in this case, we apply the same standard used by that court in evaluating Commerce's determinations, findings and conclusions and hold unlawful any decisions found to be unsupported by substantial evidence or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (2000).

### A. The Tolling Regulation and Commerce's Industry Support Determination

Before an antidumping and countervailing duty investigation can be initiated, the petition on which that investigation is based must meet certain industry

support requirements. A petition is considered to be filed on behalf of an industry if:

> (i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and
>
> (ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.

19 U.S.C. § 1673a(c)(4)(A) (2000).

Commerce determined that in order to be a producer, an entity must have a "stake" in the domestic industry in question. Commerce then defined having a "stake" as undertaking the "actual production of the domestic like product" within the United States. *Remand Determination* at 13. Commerce's industry support determination considered USEC to be the only domestic producer of LEU. Accordingly, Commerce found that there was sufficient domestic industry support to begin an antidumping and countervailing subsidy investigation. The Court of International Trade affirmed Commerce's determination that foreign uranium enrichers were "producers" for the purposes of § 1673a(c)(4)(A).

On appeal, appellants AHUG, Eurodif, CGMN and Cogema argue that American utility companies should be considered "producers" for the purposes of determining whether USEC's petition has sufficient industry support to trigger Commerce's antidumping and countervailing duty investigation. In support, they note that Commerce's tolling regulation orders Commerce not "to consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product." 19 C.F.R. § 351.401(h) (2004). According to the appellants, if the tolling regulation were applied in this case, Commerce could not initiate any antidumping or countervailing duty investigation because the domestic utilities would be considered "producers" for the purposes of an industry support determination—and given such a definition of "producer," the dictates of § 1673a(c)(4)(A) would not be satisfied. They draw further support for their argument from prior Commerce determinations that held that control of the aspects of manufacture is sufficient to qualify an entity as a "producer." Finally, they buttress their argument by alleging that Commerce improperly and inconsistently applied the tolling regulation by using it to determine the export price of LEU but declining to apply it in its industry support determination.

The Court of International Trade rejected AHUG's argument and sustained Commerce's interpretation of the term "producer" for the purpose of an industry support determination as well as its refusal to apply the

tolling regulation to encompass American utilities within the definition of the term "producer." *USEC II*, 281 F.Supp.2d at 1346. The court supported its holding by determining that Commerce's use of the tolling regulation was in keeping with the purposes of the industry support statute and that Commerce's interpretation of the word "producer" was reasonable and, thus, in accordance with law. *Id.* On this issue, we agree with the Court of International Trade and affirm Commerce's initial industry support determination.

Commerce's determination that domestic utilities were not "producers" of LEU is consistent with the purpose of § 1673a(c)(4)(A). Section 1673a(c)(4) speaks of "industry support" and, as expressed in legislative history, Congress intended the industry support statute "to provide an opportunity for relief for an adversely affected industry and to prohibit petitions filed by persons with no stake in the result of the investigation." S.Rep. No. 249, 96th Cong., 1st Sess. 47 (1979). This view was echoed by the Court of International Trade when it noted that "[t]he language in the legislative history is broad and unqualified. It contrasts industries suffering adverse effect with those having no stake: the former have standing, the latter do not." *Brother Indus. (USA), Inc. v. United States*, 801 F.Supp. 751, 757 (Ct. Int'l Trade 1992). Commerce interpreted having a "stake" as requiring that a company "perform some important or substantial manufacturing operation." *Remand Determination* at 14 (internal quotations and citations omitted). There is no basis to conclude that Commerce's interpretation in this context is unreasonable or not in accordance with law.

Further, determining the export price of a good and determining whether a petition has enough support for an investigation to be initiated are two different tasks that were delegated to Commerce for different purposes. Thus, using the tolling regulation in one context but not using it in another is a clearly insufficient basis upon which to conclude that Commerce's action was not in accordance with law.

## B. The Characterization of Enrichment Contracts

Under the statutory scheme adopted by Congress, the sale of goods (or "merchandise") is covered by the antidumping duty statute. *See* 19 U.S.C. § 1673. The provision of services, however, is not covered by that statute.

In a previous case dealing with SWU contracts and the Contract Disputes Act ("CDA"), we agreed with the government's argument that an SWU contract for the enrichment of uranium is a service contract and, thus, not covered by the CDA. *See Fla. Power & Light Co. v. United States*, 307 F.3d 1364 (Fed.Cir.2002). The parties dispute the relevance of *Florida Power* to this case.

On appeal, the government and USEC submit that Commerce's finding that SWU contracts are contracts for the sale of goods is supported by substantial evidence and in accordance with law and that the Court of International Trade's holding to the contrary should be reversed. They rely on three principal contentions.

First, they argue that this court's precedents in *NTN Bearing Corp. of Am. v. United States*, 368 F.3d 1369 (Fed.Cir.2004), *AK Steel Corp. v. United States*, 226 F.3d 1361 (Fed.Cir.2000), and *NSK Ltd. v. United States*, 115 F.3d 965 (Fed.Cir.1997) support their argument that the SWU contracts in question were sales of merchandise and not arrangements for services. They point to this court's construction of the word "sold" in *NSK* as supporting the view that a sale requires "both a transfer of ownership to an unrelated party and consideration." *See NSK*, 115 F.3d at 975. They also cite to our opinions in *AK Steel* and *NTN* as supporting this construction. According to the government and USEC, this straightforward interpretation should cover the SWU contracts because those contracts involved a transfer of title to LEU from the enricher to the utilities upon sampling and weighing of the LEU and consideration paid by the utilities to the enrichers.

Second, the government and USEC assert that Commerce's characterization of the SWU contracts as contracts for the sale of goods is in keeping with the general purpose of the antidumping statute, which they articulate as "provid[ing] domestic producers protection from all dumped imports."

Third, the government and USEC point to the deferential standard of review under which we review Commerce determinations as precluding a reversal of Commerce's determination on this issue. They argue that because Commerce's determination that SWU contracts are contracts for the sale of goods is, in their eyes,

supported by substantial evidence and in accordance with law, we should affirm it.

It is on these grounds, according to the appellants, that *Florida Power* is inapposite to this case. Because *Florida Power* dealt with a contractual dispute under the CDA and not an antidumping investigation, it is not, in their view, applicable here. Moreover, they argue that *Florida Power* stands for the proposition that "SWU contracts [fall] into neither [the category of sales of goods nor the category of contracts for services]." As support, they point to language in our opinion in *Florida Power* that indicates that an SWU contract "does not fall neatly into" either side of the goods-services divide. *See Fla. Power*, 307 F.3d at 1373. The government and USEC consider this language sufficient to support Commerce's determination given the deferential standard of review to be applied in this case.

The Court of International Trade rejected Commerce's determination that the SWU contracts in this case were contracts for the sale of goods and not services, resting its decision on the fact that the enrichers never obtained ownership of either the feed (unenriched) uranium during enrichment or the final LEU product. *USEC II*, 281 F.Supp.2d at 1339. Furthermore, according to the court, the SWU contracts between the utilities and the enrichers demonstrated "an intention to establish a continuous chain of ownership in the utility while maintaining the enricher's ability to cover its obligations under the contract should it encounter difficulties in producing or providing LEU for

a customer." *Id.* The court also found that "nothing in the evidentiary record supports a determination that the enricher has any ownership rights [under the SWU contracts]." *Id.* at 1340. Agreeing with the Court of International Trade, we reject Commerce's determination that the SWU contracts in this case are contracts for the sale of goods.

In reviewing the contracts in this case, it is clear that ownership of either the unenriched uranium or the LEU is not meant to be vested in the enricher during the relevant time periods that the uranium is being enriched. While it is correct that a utility may not receive the LEU that was enriched from the exact unenriched uranium that it delivered to the enricher, it is nevertheless true that up until the sampling and weighing of the LEU before delivery, the utility retains title to the quantity of unenriched uranium that is supplies to the enricher. The utility's title to that uranium is only extinguished upon the receipt of title in the LEU for which it contracted. Therefore, the SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU. As a result, the "transfer of ownership" required for a sale under *NSK* is not present here.

As previously noted, we explicitly dealt with whether or not SWU contracts were contracts for services or goods in *Florida Power* (albeit in the context of a CDA claim and not in the context of an antidumping investigation). In that case, the government argued that

SWU contracts were contracts for services and not goods. There, the government pointed out in its briefs that the SWU contracts in that case consistently referred to "enrichment services" and that the "fundamental purpose" of those contracts was "the provision of enrichment services." The government further declared that the utilities' argument in that case that the SWU contracts arranged for the sale of goods because title passed between utilities and enrichers "rest[ed] on [a] technicality."[2]

The relevant SWU contract terms in that case are identical to the contract terms in this case. Indeed, the government successfully defeated the CDA claim of the utilities in *Florida Power* solely on the ground that the SWU contract in that case was a contract for services and not for goods. And while *Florida Power* is not binding precedent for this case because of the different statutory scheme involved, we find its reasoning and its conclusion persuasive.

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2. The title argument that "rest[ed] on [a] technicality" in that case is strikingly similar to the title argument that the government advances in this case. There, the government argued that despite the temporary transfer of title of uranium from the utility to the enricher, the fact that the utilities were entitled to claim any leftover material from uranium enrichment (also known as "tails") showed that the SWU contract was a contract for services. Here, the utilities were likewise contractually entitled to reclaim the uranium "tails" and title to the quantity of unenriched uranium transferred by the utility only passed to the enricher once the utilities received title to the LEU from the enrichers.

In addition, while it is true that we stated that SWU contracts "[do] not fall neatly into either [a sale of goods or a contract for services]," our opinion definitively held that the SWU contract in that case was a contract for the provision of services. *Fla. Power*, 307 F.3d at 1373.[3] Holdings of this court are no less decisive because they may have been difficult to develop. Indeed, our characterization of the SWU contract in *Florida Power*, however we may have arrived at it, created the sole basis for denying the utilities in that case relief under the CDA. And even under the deferential standard of review that we apply in this case, we choose not to ignore our previous holdings, particularly where the circumstances in a previous case are nearly identical to the case at hand.

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3. In regards to the contracts between utilities and the government for enrichment of uranium, we stated in *Florida Power*:

> It seems clear that if the government purchased natural uranium directly from a third party, enriched the uranium, and sold it to the customer utilities, the contracts would be for the disposal of personal property and would be covered by the CDA. It seems equally clear that if the government simply enriched each utility's uranium for a fee, it would be providing a service, not disposing of personal property.
>
> In light of the evidence that DOE used feed material from other customers, and sometimes its own feed material, to fulfill a particular enriched customer's order of enriched uranium, this case does not fall neatly into either the above categories, but it is closer to the latter. The nature of the contractual pricing scheme, in particular, persuades us that the transaction is properly characterized as a service rather than a sale.

307 F.3d at 1373.

Moreover, while the statutory schemes involved in *Florida Power* and those involved in this case are different, they do not change the essential nature of the transaction involved in this case. Even though the government is correct in arguing that the general purpose of the antidumping statute is not the same as the general purpose of the CDA, it is incorrect in asserting that this dissimilarity of purposes is sufficient to compel a different result in this case. A contract for services of the kind that we discuss here entails a certain set of obligations on the part of contracting parties that do not change with the statutory scheme. Thus, unless Congress specifically gave guidance in the statutory text that certain contracts normally considered service contracts should be considered contracts for the sale of goods in the antidumping context, the different overall purposes of the CDA and antidumping statute are insufficient to alter our analysis here. And nothing in the text of the antidumping statute or its legislative history evidences such a Congressional intent to re-characterize contracts like the SWU contracts at issue in this case for the purposes of antidumping investigations by Commerce.

The persuasive power of *Florida Power* might be mitigated if the government were capable of showing that the contract in that case differed in relevant part from the contracts in this case. No such showing has been made. In *Florida Power*, we held that an SWU contract was not a contract for "the procurement of property" under the CDA. 307 F.3d at 1373-74. Though we did say that SWU contracts do "not fall neatly" either into the

category of contracts for services or the category of contracts for the sale of goods, we found that "the nature of the contractual pricing scheme . . . persuade[d] us that the [SWU] transaction is properly characterized as a service rather than a sale." *Id.* The pricing scheme in the *Florida Power* SWU contracts is the same as the pricing scheme in the contracts at issue in this case. In both cases, utilities bought separative work units from enrichers. In both cases, they delivered unenriched uranium and monetary compensation to enrichers in return for enrichment services. In both cases, there were similar title and transfer provisions. And in both cases, the contracts explicitly contemplated the rendering of "enrichment services."

We therefore conclude that the SWU contracts at issue in this case were contracts for the provision of services and not for the sale of goods. Accordingly, we find that the LEU produced as a result of those contracts is not subject to the antidumping statute and hold that Commerce's contentions to the contrary are not in accordance with law.

## C. EdF, Eurodif and Countervailable Subsidies

In order to be subject to a countervailing duty (or subsidy) investigation, an arm of a foreign government must make a "financial contribution" to a manufacturer that can take one of four forms:

> (i) the direct transfer of funds, such as grants, loans, and equity infusions, or the

potential direct transfer of funds or liabilities, such as loan guarantees,

(ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income,

(iii) providing goods or services, other than general infrastructure, or

(iv) purchasing goods.

19 U.S.C. § 1677(5)(D) (2000). A public entity can provide a subsidy if it provides goods or services to a manufacturer for less than adequate remuneration or if it buys goods from the manufacturer for more than adequate remuneration. 19 U.S.C. § 1677(5)(E). The statute does not contemplate the purchase of services for more than adequate remuneration to be a subsidy.

The government and USEC assert that EdF, a partially public French utility, entered into a uranium enrichment contract with Eurodif that paid Eurodif more than adequate remuneration. In their view, the contract was also for the sale of goods (instead of services) and thus covered by 19 U.S.C. § 1677(5)(E). In the alternative, they argue that the contract between EdF and Eurodif provided more than adequate remuneration to one step (enrichment) in the manufacture of a good (LEU in this case) and was thus covered by § 1677(5). As a result, the transaction between EdF and Eurodif was subject to a countervailing duty investigation.

*Appendix A*

The Court of International Trade rejected the government's principal theory but agreed with its alternative theory. The court found that "Commerce's distinction between manufacturing processes that lead to the production of subject merchandise and other services that do not produce tangible goods is consistent with the language and purpose of the countervailing duty statute." *USEC II*, 281 F.Supp.2d at 1350. The court further elaborated that this theory was in keeping with the statutory language "because it preserves a real distinction between 'goods' and 'services.'" *Id.* We must disagree.

Section 1677(5) is clear as to what constitutes a subsidy—and the purchase of a service by a foreign public entity, however related to the manufacture of a good, is not contemplated in the statute as being a subsidy.[4] While the provision of services by a government entity to another entity for less than adequate compensation may be considered a subsidy, the plain language of § 1677(5) does not allow for the *purchase* of services by a government entity from another entity to be considered a subsidy. Thus, to the extent that the government argues that Commerce is owed deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), we reject that argument because we find that the plain meaning of the statute is unambiguous.

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4. Section 1677(5)(B) defines a subsidy as including the case in which an authority "provides a financial contribution . . . to a person and a benefit is thereby conferred." Section 1677(5)(D), quoted *supra*, defines "financial contribution."

Furthermore, § 1677(5)(D)(iii) clearly shows that Congress was aware of the distinction between contracts for services and contracts for goods. Aware of the distinction, Congress could have easily included the purchase of services by public entities in the statutory definition of a subsidy. Because it did not, we must assume that the omission was intentional. *See Clay v. United States*, 537 U.S. 522, 528, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003) ("When Congress includes particular language in one section of a statute but omits it in another section of the same Act, we have recognized, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotations and citations omitted)).

While the Court of International Trade, the government and USEC are correct that the purpose of the subsidy statute is to defeat unfair competitive advantage, that purpose cannot exceed the metes and bounds of the subsidy statute as established by its text. *See Negonsott v. Samuels*, 507 U.S. 99, 105, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993) ("[A court's] task is to give effect to the will of Congress, and where it has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982))).

Given that we have already concluded that the SWU contracts in this case were contracts for the provision of services and not for the sale of goods, we hold that 19 U.S.C. § 1677(5) is inapplicable in this case. Accordingly, Commerce's determination to the contrary is not in accordance with law.

## D. Commerce's Tolling Regulation and Its Determination of Export Price

Because our holdings regarding the previous three issues obviate the need for us to reach the issue of whether Commerce properly employed its tolling regulation in its determination of export price, we decline to do so.

## CONCLUSION

For the reasons stated above, we hold that:

(1) Commerce's determination that USEC's petition had sufficient industry support to trigger an antidumping and countervailing subsidy investigation was in accordance with law;

(2) Commerce's finding that the SWU contracts in this case were contracts for the sale of goods was neither supported by substantial evidence nor in accordance with law; and

(3) Commerce's application of 19 U.S.C. § 1677 to the SWU transaction between EdF and Eurodif was not in accordance with law.

Therefore, we affirm the Court of International Trade's decision regarding Commerce's industry support determination. We likewise affirm the court's finding that the SWU contracts in this case were contracts for services and not for goods or merchandise. We reverse the court's holding that EdF's SWU contract with Eurodif made the LEU produced by Eurodif subject to the countervailing subsidy statute.

*AFFIRMED-IN-PART and REVERSED-IN-PART*

**APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED SEPTEMBER 9, 2005**

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

Nos. 04-1209, 04-1210

EURODIF S.A., COMPAGNIE GENERALE DES MATIERES NUCLEAIRES, and COGEMA, INC.,

Plaintiffs-Appellants,

and

AD HOC UTILITIES GROUP,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Cross Appellant,

and

USEC INC. and UNITED STATES ENRICHMENT CORPORATION,

Defendants-Cross Appellants.

September 9, 2005, Decided

**JUDGES** Before BRYSON, Circuit Judge, PLAGER, Senior Circuit Judge, and PROST, Circuit Judges.

**OPINION BY:** PROST

*Appendix B*

## OPINION

ON PETITION FOR REHEARING

PROST, Circuit Judge.

*ORDER*

More than three months after we decided this case, the Supreme Court issued its opinion in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, __ U.S. __, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005). In letters disclosing *National Cable* as a supplemental authority pursuant to Federal Circuit Rule 28(j), the United States, USEC, Inc. and the United States Enrichment Corporation (collectively, "Petitioners") contend that the Supreme Court's reasoning in *National Cable* strongly supports arguments presented in their petitions for rehearing. We grant the petitions for rehearing by the panel for the limited purpose of addressing the applicability of *National Cable* to this case. In all other respects, we reaffirm our earlier opinion and judgment. *See Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed.Cir.2005).

I

In *National Cable* the Supreme Court heard an appeal from the Ninth Circuit in a case involving the proper regulatory classification of broadband cable Internet service under the Communications Act of 1934, 48 Stat. 1064, as amended by the Telecommunications Act of 1996, 110 Stat. 56. *See* 125 S.Ct. at 2696. The Ninth Circuit had vacated a ruling by the Federal Communications Commission ("FCC") to the extent the

FCC's ruling concluded that cable modem service was not "telecommunications service" under the Communications Act. *Id.* at 2698. "Rather than analyzing the permissibility of that construction under the deferential framework of *Chevron*, . . . the Court of Appeals grounded its holding in the *stare decisis* effect of *AT&T Corp. v. Portland*. . . ." *Id.* (citations omitted).

The Supreme Court reversed and remanded. It held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 2700. It similarly stated that "[b]efore a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction." *Id.* at 2702.

The Supreme Court explained that *Chevron* set forth a two-step process to evaluate whether an agency's interpretation of a statute is lawful. At step one we determine "whether the statute's plain terms 'directly addres[s] the precise question at issue.' " *Id.* (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). If we determine that the statute is ambiguous on the precise question at issue, "we defer at step two to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.' " *Id.* (quoting *Chevron*, 467 U.S. at 845, 104 S.Ct. 2778). On the other hand, if we determine that the statute is unambiguous on the precise question at issue, we do not defer to the agency's

interpretation, regardless of whether that interpretation is grounded in a reasonable policy choice. *See id.*

II

Petitioners argue that the holding of *National Cable* strongly supports their contention that we erroneously relied upon *Florida Power & Light v. United States*, 307 F.3d 1364 (Fed.Cir.2002), to conclude that the Department of Commerce's ("Commerce's") finding, that the separative work units ("SWU") contracts at issue in this case were contracts for the sale of goods and therefore subject to the antidumping duty statute, is not in accordance with law. In particular, the United States argues that we have not held, either in *Florida Power* or here, "that the antidumping 'statute unambiguously requires' that the term 'sold' excludes the acquisition of imported merchandise in exchange for raw materials and cash." Similarly, USEC, Inc. and the United States Enrichment Corporation (collectively, "USEC") contend that we "erroneously relied upon the earlier determination of this Court in *Florida Power & Light Co. v. United States* so as to fail to give appropriate deference to the Commerce Department's conclusion that the import transactions [here] involved a sale of merchandise under the antidumping law."

III

As a preliminary matter, Petitioners are incorrect to the extent they imply that we found ourselves bound by *Florida Power* in this case under the doctrine of *stare decisis*. To the contrary, we specifically stated that " *Florida Power* is not binding precedent for this case" but that it is "persuasive" authority. *Eurodif*, 411 F.3d

at 1363; *cf. National Cable*, 125 S.Ct. at 2701 (noting that the Ninth Circuit held that a prior judicial construction of a statute categorically controls an agency's contrary construction).[1]

On the other hand, Petitioners are correct to the extent they point out that in *Florida Power* we did not expressly hold that the antidumping duty statute "unambiguously" applies to contracts for the sale of goods only and "unambiguously" does not apply to the contracts at issue in this case in particular. And although in our opinion in this case we did expressly hold that the countervailing duty statute unambiguously does not allow for the purchase of services to be considered a subsidy, *Eurodif*, 411 F.3d at 1365, as in *Florida Power* we did not expressly state that the antidumping duty statute unambiguously applies to contracts for the sale of goods only and unambiguously does not apply to the contracts at issue in this case in particular.

We now clarify by stating expressly that the antidumping duty statute unambiguously applies to the sale of goods and not services. In our opinion, we stated that "[u]nder the statutory scheme adopted by Congress, the sale of goods (or 'merchandise') is covered by the

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1. In this regard, we rejected the argument that we should ignore the analysis and reasoning of *Florida Power* because that case involved a different statutory scheme. We chose not to ignore *Florida Power*, but instead to recognize its persuasive power, because the nearly identical circumstances in that case were those surrounding SWU contracts. *See Eurodif*, 411 F.3d at 1363.

antidumping duty statute" but that the "provision of services, however, is not. . . ." *Eurodif*, 411 F.3d at 1361. While we did not use the term "unambiguous," we clearly foreclosed any argument that § 1673 is ambiguous on the precise question of whether the antidumping duty statute encompasses contracts for services. It undoubtedly does not.

Commerce's characterization of the SWU contracts at issue in this case would contradict, we conclude, the statute's unambiguous meaning because it is clear that those contracts are contracts for services and not goods. While Petitioners concede that a sale of goods requires a transfer of ownership, *see* United States' Petition for Rehearing at 9 (citing *NSK Ltd. v. United States*, 115 F.3d 965 (Fed.Cir.1997)) and USEC's Petition for Rehearing at 2 (same), they do not recognize the critical importance of the indisputable fact that, pursuant to the contracts at issue in this case, enrichers never obtain ownership of either the feed (unenriched) uranium during enrichment or the final low enriched uranium ("LEU") product. Nevertheless, the inescapable conclusion flowing from this circumstance is that the enrichers do not "sell" LEU to utilities pursuant to the SWU contracts at issue in this case.

As we stated in our opinion:

> In reviewing the contracts in this case, it is clear that ownership of either the unenriched uranium or the LEU is not meant to be vested in the enricher during the relevant

> time periods that the uranium is being enriched. While it is correct that a utility may not receive the LEU that was enriched from the exact unenriched uranium that it delivered to the enricher, it is nevertheless true that up until the sampling and weighing of the LEU before delivery, the utility retains title to the quantity of unenriched uranium that is supplie[d] to the enricher. The utility's title to that uranium is only extinguished upon the receipt of title in the LEU for which it contracted. Therefore, the SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU. As a result, the "transfer of ownership" required for a sale [of goods] is not present here.

*Eurodif*, 411 F.3d at 1362. We adhere to that analysis today, noting that the complete absence of a transfer of ownership over LEU requires that we reject Commerce's application of the antidumping duty statute to the SWU contracts.

## IV

This Order constitutes the panel's action in response to the petitions for rehearing. We conclude that our analysis in this case is consistent with the Supreme Court's holding in *National Cable*, and we reaffirm our decision that Commerce's finding that the SWU contracts were contracts for the sale of goods and therefore subject to the antidumping duty statute was not in accordance with law.

## APPENDIX C — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED SEPTEMBER 21, 2007

## UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-1005, -1006

EURODIF S.A., COMPAGNIE GENERALE DES MATIERES NUCLEAIRES, and COGEMA, INC.,

Plaintiffs-Appellees,

and

AD HOC UTILITIES GROUP,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant,

and

USEC INC. and UNITED STATES ENRICHMENT CORPORATION,

Defendants-Appellants.

DECIDED: September 21, 2007

Before MICHEL, *Chief Judge*, LOURIE, *Circuit Judge*, and ROBERTSON, *District Judge*.*

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* Honorable James Robertson, District Judge, United States District Court for the District of Columbia, sitting by designation.

*Appendix C*

ROBERTSON, *District Judge*.

In this dispute about the correct application of the antidumping statute, 19 U.S.C. § 1673, to enriched uranium feedstock, appellants United States, USEC Inc., and United States Enrichment Corp. (the latter two collectively referred to as "USEC") appeal from a judgment of the United States Court of International Trade. *Eurodif S.A. v. United States*, 442 F.Supp.2d 1367 (Ct. Int'l Trade 2006). In 2005, we issued two interlocutory opinions in the same case, *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed.Cir.2005) ( "*Eurodif I*"), and *Eurodif S.A. v. United States*, 423 F.3d 1275 (Fed.Cir.2005) ("*Eurodif II*"). Because the issues appellants raise in the instant appeal concern only the application of those decisions to future entries of low enriched uranium, we dismiss the appeal as unripe.

## I. BACKGROUND

In *Eurodif I* and *Eurodif II*, we found that separate work unit ("SWU") contracts for the enrichment of uranium were contracts for services, rather than for the sale of goods, and that the low enriched uranium ("LEU") produced under those contracts was therefore not subject to the antidumping statute. *Eurodif I*, 411 F.3d at 1364; *Eurodif II*, 423 F.3d at 1278. Following those decisions, the Court of International Trade issued a remand order, instructing the Department of Commerce ("Commerce") to revise its final determination and order, and to "explain how its final determination and order on remand has eliminated all SWU transactions" in

accordance with our decisions. *Eurodif S.A. v. United States*, 414 F.Supp.2d 1263 (Ct. Int'l Trade 2006) ("*Eurodif III*"). Acting pursuant to that order, Commerce excluded LEU covered by SWU contracts from its recalculation of the duty margin, *Final Results of Redetermination Pursuant to Court Remand, Eurodif S.A. v. United States* (Mar. 3, 2006), but it did not modify the scope of the antidumping duty order to exclude future imports of LEU covered by SWU contracts.

Plaintiffs-Appellees Eurodif S.A., Cogema, and Cogema, Inc. (collectively referred to herein as "Eurodif") supported Commerce's action, as far as it went, but they also asked the Court of International Trade to require Commerce to amend the scope order so that it would expressly exclude LEU covered by SWU contracts. Defendant-Appellant USEC supported Commerce's decision not to amend the scope order, but asserted that it was error for Commerce to exclude all LEU imported pursuant to SWU contracts from its recalculation without investigating the facts behind each contract to determine whether the transaction was a sale of services, as stated in the contract, or was in fact a sale of goods.

The Court of International Trade agreed with Eurodif. It found that our opinions in *Eurodif I* and *Eurodif II* took into account the factual circumstances operating behind the individual contracts in this case and therefore that Commerce was correct to exclude all LEU covered by those SWU contracts from its recalculation.

*Eurodif S.A. v. United States*, 431 F.Supp.2d 1351, 1354 (Ct. Int'l Trade 2006) ("*Eurodif IV*"). Furthermore, the Court of International Trade concluded that our previous opinions required Commerce to rewrite the scope of the antidumping duty order, and it remanded the case to Commerce once again with instructions to amend the order to exclude all LEU covered by SWU contracts from the "class or kind of merchandise" covered by the order. *Id.* at 1355 (citing 19 U.S.C. § 1673e(a)(2)). On this second remand, Commerce redefined the scope of the antidumping order to exclude any entry of LEU that is accompanied by a certification claiming that the entry is made pursuant to a SWU contract. The Court of International Trade sustained, *Eurodif S.A. v. United States*, 442 F.Supp.2d 1367 (Ct. Int'l Trade 2006) ("*Eurodif V*"), and this appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

## II. DISCUSSION

In *Eurodif I* and *Eurodif II*, we found that the SWU contracts at issue "in this case" were contracts for the sale of services that were not subject to the antidumping statute. *See Eurodif I*, 411 F.3d at 1362, 1364. We did not address how Commerce should determine whether *future* entries of LEU are made pursuant to SWU contracts. The contentions of the government and USEC on this appeal are directed to future entries. They argue that Commerce should be permitted to suspend liquidation of future LEU imports until it determines—transaction-by-transaction and by administrative review—whether the SWU contract exception applies.

USEC additionally argues that the scope amendment and certification should be modified now to make it clear that future LEU imports will not be outside the scope of the antidumping law if the unenriched uranium is either (a) obtained from an affiliate of the enricher or (b) delivered to the enricher after entry.

Neither the procedural question presented here (scope review vs. administrative review) nor the substantive questions relating to affiliation of the enricher are ripe for decision. The doctrine of ripeness is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). It is drawn "both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction, but, even in a case raising only prudential concerns, the question of ripeness may be considered on a court's own motion." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003) (citing *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n. 18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993) (citations omitted)).

## *Appendix C*

### *Administrative Review vs. Scope Determination*

The Court of International Trade found that an administrative review is not the "proper forum to address whether merchandise is within the scope of an order," and that Commerce's own regulations authorize a different mechanism for this purpose: a "scope determination." *Eurodif IV*, 431 F.Supp.2d at 1356. At the request of any interested party, Commerce may "initiate an inquiry" as to whether merchandise is within the scope of an antidumping duty order. *Id.* (citing 19 C.F.R. § 351.225(b)). If the Secretary determines that the product in question is included within the scope of the order, he may instruct Customs to suspend liquidation for each unliquidated entry, effective as of the date the scope inquiry was initiated. 19 C.F.R. § 351.225(l)(2). That determination is reviewable by the Court of International Trade. 28 U.S.C. § 1581(c).

Appellants argue that this scope determination process is inadequate, because, as a practical matter, an entry of LEU under review will be liquidated before Commerce can complete its determination. They assert that determining whether a particular transaction is entitled to the SWU-contract exception requires a careful analysis of the contract itself and an opportunity to investigate the manner of its execution. The administrative review process would permit Commerce to suspend liquidation while such an assessment takes place, but the scope determination process permits Commerce to suspend liquidation only after the Secretary has issued a preliminary scope ruling. USEC

notes that liquidation typically occurs ten months after entry, but Commerce's previous assessments of LEU contracts have taken seventeen to eighteen months.[1] As a result, appellants argue, the scope determination process will not be completed before the entry under review has been liquidated, mooting the review.

This dispute is about what may or may not happen with the next LEU case—a case about which we have no facts. Our decisions in *Eurodif I* and *Eurodif II* did not resolve the procedural problem that USEC and the government have presented here, but we decline to attempt a resolution on this record. We have held that SWU contracts are contracts for services and that the LEU in this case entered under SWU contracts. Whether the next contested shipment of LEU is covered by a valid SWU contract is a question that must await the next case. If Commerce is correct, and the next disputed LEU entry is liquidated before Commerce can complete its scope review, the dispute will not be rendered non-justiciable, as it would be "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911).

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1. Eurodif responds that Commerce's regulations provide for the issuance of final scope rulings within 120 days, but the regulation clearly states only that a decision "normally" will be reached within that time. 19 C.F.R. § 351.225(f)(5).

*Appendix C*

*LEU Obtained from or Sold to Affiliates*

The more substantive questions USEC brings on this appeal also require a specific factual context for their resolution, and such a record is not before us. USEC wants it made clear that future LEU imports will not avoid antidumping penalties if the unenriched uranium was either (a) obtained from an affiliate of the enricher or (b) delivered to the enricher after the importation of the LEU. Although USEC does not challenge our finding that the contracts in this case were contracts for the sale of services,[2] it seeks clarification as to whether our holding would apply to future entries with these characteristics. Until we have record evidence regarding such entries, however, USEC's questions are non-justiciable. *Elec. Bond & Share Co. v. S.E.C.*, 303 U.S. 419, 443, 58 S.Ct. 678, 82 L.Ed. 936 (1938) ("We are invited to enter into a speculative inquiry for the purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation.").

## III. CONCLUSION

For the aforementioned reasons, we dismiss.

*DISMISSED.*

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2. USEC initially requested that we order Commerce to reopen the record of the SWU contracts analyzed in *Eurodif I* and *Eurodif II* to examine purchases of unenriched uranium from affiliates, but now acknowledges that it raised this question in its appeal of Commerce's final redetermination of the antidumping duty, and that we rejected that appeal. *Eurodif S.A. v. United States*, 217 Fed.Appx. 963 (Fed.Cir.2007).

*Appendix C*

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

2007-1005, -1006

EURODIF S.A., COMPAGNIE GENERALE DES MATIERES NUCLEAIRES and COGEMA, INC.,

Plaintiffs-Appellees,

and

AD HOC UTILITIES GROUP,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant,

and

USEC INC. and UNITED STATES ENRICHMENT CORPORATION,

Defendants-Appellants.

**JUDGMENT**

ON APPEAL from the United States Court of International Trade

in CASE NO(S). 02-CV-00219 and 02-CV-00234

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

*DISMISSED*

*Appendix C*

ENTERED BY ORDER OF THE COURT

s/ Jan Horbaly
Jan Horbaly, Clerk

DATED SEP 21 2007

## APPENDIX D — FINAL DETERMINATION BY THE DEPARTMENT OF COMMERCE DATED DECEMBER 21, 2001

FEDERAL REGISTER

Vol. 66, No. 246

Notices

DEPARTMENT OF COMMERCE

International Trade Administration

Import Administration

[A-427-818]

### Notice of Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium From France

*66 FR 65877*

**DATE:** Friday, December 21, 2001

**ACTION:** Notice of final determinations of sales at less than fair value.

**EFFECTIVE DATE:** December 21, 2001.

*Appendix D*

**FOR FURTHER INFORMATION CONTACT:** Victoria Schepker or Edward Easton, at (202) 482-1756 or (202) 482-3003, respectively; AD/CVD Enforcement, Office 5, Group II, Import Administration, Room 1870, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:**

**The Applicable Statute**

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to Department of Commerce (Department) regulations refer to the regulations codified at 19 CFR part 351 (April 2000).

**Final Determination**

We determine that low enriched uranium (LEU) from France is being sold, or is likely to be sold, in the United States at less than fair value (LTFV), as provided in section 735 of the Act. The estimated margins of sales at LTFV are shown in the Continuation of Suspension of Liquidation section of this notice.

*Appendix D*

*Case History*

The preliminary determination in this investigation was published on July 13, 2001. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Low Enriched Uranium from France*, 66 FR 36743 (July 13, 2001) (*Preliminary Determination*). The petitioners[1] and the respondent, Eurodif, S.A. (Eurodif), the sole producer of the subject merchandise, and its owner, Compagnie Generale des Matieres Nucleaires (Cogema) (collectively, Cogema/Eurodif or the respondent), filed case briefs on antidumping methodological issues on September 28, 2001, and rebuttal briefs on October 9, 2001. A rebuttal brief was also filed by the Ad Hoc Utilities Group (Ad Hoc Utilities Group or AHUG).[2]

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1. The petitioners in this investigation are USEC, Inc., and its wholly-owned subsidiary, United States Enrichment Corporation (collectively USEC); and the Paper Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC, Local 5-550 and Local 5-689 (collectively PACE).

2. The members of the Ad Hoc Utilities Group are: Arizona Public Service Co., Carolina Power & Light Co., Dominion Generation, Duke Energy Corp., DTE Energy, Entergy Services, Inc., Exelon Corporation, First Energy Nuclear Operating Co., Florida Power Corp., Florida Power and Light Co., Nebraska Public Power District, Nuclear Management Co. LLC (on behalf of certain member companies), PPL Susquehanna LLC, PSEG Nuclear LLC, South Texas Project, Southern California Edison, Southern Nuclear Operating Co., Union Electric Company, and Wolf Creek Nuclear Operating Corp.

*Appendix D*

A public hearing on the antidumping methodological issues was held on October 23, 2001.

On October 22 and 23, 2001, the petitioners, respondent, and the Ad Hoc Utilities Group filed briefs on common scope issues in the antidumping and countervailing duty investigations of low enriched uranium from France, Germany, the Netherlands and the United Kingdom. Rebuttal briefs on these common scope issues were filed on October 29, 2001, and a public hearing on the common scope issues was held on October 31, 2001. In response to a September 28, 2001 submission by the European Commission to Mr. Grant Aldonas, Under Secretary for International Trade, regarding the antidumping duty (AD) and countervailing duty (CVD) investigations of LEU from France, Germany, the Netherlands, and the United Kingdom, and Mr. Aldonas' November 7, 2001 reply to this letter and the November 22, 2001 submission from the European Commission, the petitioners, respondent and the Ad Hoc Utilities Group filed briefs that addressed the content of this correspondence.

This final determination was originally scheduled to be issued on November 26, 2001. On November 6, 2001, the Department tolled the final determination deadlines, until December 13, 2001, to accommodate a delayed verification and briefing and hearing schedule in the companion countervailing duty investigation, due to the events of September 11, 2001.

*Appendix D*

*Amended Scope of Investigation*

For purposes of this investigation, the product covered is all low enriched uranium (LEU). LEU is enriched uranium hexafluoride ($UF_6$) with a $U^{235}$ product assay of less than 20 percent that has not been converted into another chemical form, such as $UO_2$, or fabricated into nuclear fuel assemblies, regardless of the means by which the LEU is produced (including LEU produced through the down-blending of highly enriched uranium).

Certain merchandise is outside the scope of this investigation. Specifically, this investigation does not cover enriched uranium hexafluoride with a $U^{235}$ assay of 20 percent or greater, also known as highly enriched uranium. In addition, fabricated LEU is not covered by the scope of this investigation. For purposes of this investigation, fabricated uranium is defined as enriched uranium dioxide ($UO_2$), whether or not contained in nuclear fuel rods or assemblies. Natural uranium concentrates ($U_3O_8$) with a $U^{235}$ concentration of no greater than 0.711 percent and natural uranium concentrates converted into uranium hexafluoride with a $U^{235}$ concentration of no greater than 0.711 percent are not covered by the scope of this investigation.

Also excluded from these investigations is LEU owned by a foreign utility end-user and imported into the United States by or for such end-user solely for purposes of conversion by a U.S. fabricator into uranium

dioxide ($UO_2$) and/or fabrication into fuel assemblies so long as the uranium dioxide and/or fuel assemblies deemed to incorporate such imported LEU (i) remain in the possession and control of the U.S. fabricator, the foreign end-user, or their designed transporter(s) while in U.S. customs territory, and (ii) are re-exported within eighteen (18) months of entry of the LEU for consumption by the end-user in a nuclear reactor outside the United States. Such entries must be accompanied by the certifications of the importer and end user.

The merchandise subject to this investigation is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 2844.20.0020. Subject merchandise may also enter under 2844.20.0030, 2844.20.0050, and 2844.40.00. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to this proceeding is dispositive.

*Scope Clarification*

For further details, *see* Comment 2 of the "*Issues and Decision Memorandum for the Antidumping Duty Investigation of Low Enriched Uranium from France*" (*Decision Memorandum*) from Bernard T. Carreau, Deputy Assistant Secretary for Import Administration, to Faryar Shirzad, Assistant Secretary for Import Administration, dated concurrently with this notice.

*Appendix D*

*Goods Versus Services*

*Applicability of AD/CVD Law*

*The Preliminary Determination*

In the preliminary determinations in the LEU investigations, we determined that all LEU entering the United States from Germany, the Netherlands, the United Kingdom, and France is subject to the AD and CVD investigations on LEU regardless of the way in which the sales for such merchandise were structured. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Low Enriched Uranium from Germany and the Netherlands; and Postponement of Final Determinations*, 66 FR 36748, 36750 (July 13, 2001). We based our preliminary determinations on several factors. First, we found, and no party disputed, that LEU entering the United States constitutes a good, the tangible yield of a manufacturing operation. Moreover, under the U.S. Customs regulations, we recognized that any item within a tariff category for the Harmonized Tariff System constitutes merchandise for customs purposes. *See* 19 CFR 141.4 (2000). In this case, LEU is normally classified under HTSUS 2844.20.0020, but also satisfies three other HTSUS classifications described as enriched uranium compounds, enriched uranium, and radioactive elements, isotopes, and compounds.

Second, in our preliminary determinations we found it to be a well-established fact that the enrichment

process is a major manufacturing operation for the production of LEU, and that enrichment is a required operation in order to produce LEU. We found that no party disputes that the enrichment process constitutes substantial transformation of the uranium feedstock. We, therefore, preliminarily concluded that the LEU enriched and exported from Germany, the Netherlands, the United Kingdom and France are products of those respective countries, and are subject to these investigations.

Third, we found that there are significant volumes of LEU sold pursuant to contracts that expressly provide separate prices for SWU and feedstock (*i.e.*, contracts for enriched uranium product (EUP)), and that no party disputes that such sales constitute sales of subject merchandise. Rather, it is only those transactions in which utility companies obtain LEU through separate purchases of SWU and feedstock from separate entities that the Ad Hoc Utilities Group (AHUG) contends cannot be subject to the antidumping law. We preliminarily determined that there was little substantive commercial difference between the two types of transactions. We found that, simply because an unaffiliated customer purchases subject merchandise through two transactions, instead of a single transaction, does not mean that the merchandise entering the United States is not subject to the antidumping law.

Fourth, we preliminarily determined that, contrary to respondents' arguments, the tolling regulation does not provide a basis to exclude merchandise from the

scope of an investigation. Rather, we found that the purpose of the tolling regulation is to identify the seller of the subject merchandise for purposes of establishing export price, constructed export price, and normal value. Thus, under the tolling regulation, the issue is not whether the LEU in question is subject to the antidumping law, but rather who is the seller of the subject merchandise for determining U.S. price and normal value or, more specifically, what is the appropriate way in which to value subject merchandise and foreign like product. To the extent that sales of subject merchandise are structured as two transactions, we stated that we would combine such transactions to obtain the relevant price of the subject merchandise.

Fifth, we preliminarily determined that enrichers are the sellers of LEU in both types of transactions-either as an exchange of SWU and uranium feedstock for cash, or as an exchange of SWU for cash and a swap of uranium feedstock. We preliminarily determined that regardless of whether the utility company pays in cash or in kind for the natural uranium content, the LEU is delivered under essentially the same contract terms, including warranties and guarantees pertaining to the complete LEU product. Second, enrichers do not use the uranium feedstock provided by the utility companies. Instead, the natural uranium is typically delivered shortly before, or even after, delivery of the LEU, making the delivery of such uranium a payment in kind for the natural uranium component of the LEU. Third, the utility company does not have control over the process used to produce the LEU that the utility

company receives. Rather, the enricher controls the manufacture of LEU, as demonstrated by the fact that the product assay under the contract (transactional assay) differs from the product assay produced and delivered by the enricher (operational assay). The enricher makes the decision of the particular product based upon its own operational requirements and inputs costs. We preliminarily determined that, taken together, these facts indicate that enrichers are in effect selling LEU under both types of contractual arrangements.

*Discussion*

For these final determinations, we have concluded that all LEU from the investigated countries entering the United States for consumption is subject to the AD and CVD laws. We have carefully considered all comments received on this issue in response to our preliminary determinations and, for the reasons stated below, do not find persuasive the arguments that the LEU at issue is exempt from the AD and CVD laws.

For these final determinations, respondents and AHUG are joined by the EC in raising again the issue of whether the AD and CVD laws can be applied to goods sold pursuant to contracts for the provision of enrichment. Respondents and AHUG contend that, under such contracts, LEU is not sold to, or in, the importing country. Respondents contend that, for these transactions, enrichment companies sell enrichment services, which is a component of LEU. Accordingly, for those entries of LEU, sold pursuant to SWU contracts,

these parties assert that the AD and CVD laws are not applicable because respondents are not selling subject merchandise and because there is no sale of subject merchandise in the United States.

In our view, respondents and AHUG have confused fundamental concepts concerning the application of the unfair trade laws. The AD and CVD laws were enacted to address trade in goods. Thus, respondents and AHUG have confused what is being sold in a particular transaction with what is being introduced into the commerce of the United States. The Department finds that the issue of whether merchandise entering the United States is subject to the AD and CVD laws depends upon whether the merchandise produced in, and exported from, a foreign country is introduced into the commerce of the United States.

In particular, the language of section 735(a)(1) of the Act states that "the administering authority shall make a final determination of whether the subject merchandise is being, or is likely to be, sold in the United States at less than fair value." *See also* section 731(1) of the Act. We have consistently interpreted these provisions to pertain to merchandise from the investigated country, and not to companies. *See Jia Farn Mfg. Co. v. United States,* 817 F. Supp. 969, 973 (CIT 1993) ("LTFV determinations and antidumping duty orders are rendered upon the subject merchandise from a certain country under the investigation."). In other words, AD and CVD cases proceed *in rem* (*i.e.*, against the good as entered), rather than *in personam* (*i.e.*, against the parties to the import transaction).

Similarly, in conducting countervailing duty investigations, section 701(a)(1) of the Act requires the Department to impose duties if, *inter alia*, "the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, in the United States." We believe the statute is clear that, where merchandise from an investigated country enters the commerce of the United States, the law is applicable to such imports.

In these investigations, no party disputes that the LEU entering the United States constitutes merchandise. As the product yield of a manufacturing operation, the Department continues to find that LEU is a tangible product. Second, it is well established, and no party disputes, that the enrichment process is a major manufacturing operation for the production of LEU, and that enrichment is a required operation in order to produce LEU. Thus, we find that the enrichment process constitutes substantial transformation of the uranium feedstock. We continue to find, therefore, that the LEU enriched in and exported from Germany, the Netherlands, the United Kingdom and France is a product of those respective countries.

Finally, we find, and no party disputes, that the LEU at issue enters into the commerce of the United States. Thus, the question of whether enrichers sell enrichment

processing, as compared to LEU, is not relevant to the issue of whether the AD and CVD law is applicable. Rather, it is only relevant in these investigations for purposes of determining how to calculate the dumping margin and how to determine who is the producer/seller of subject merchandise.

In seeking to equate what is being sold with a service that is beyond the scope of the AD and CVD laws, respondents and AHUG assert that the enrichment of uranium is akin to the cleaning of a suit.[3] They contend that a person who takes a suit to a cleaner and picks up a clean suit is merely paying for the service of cleaning. In the case of enrichment, they assert, a person provides natural uranium to an enricher who returns enriched uranium and is paid for the services.

We agree that a cleaner merely provides a service for which one is paid. However, we disagree with the appropriateness of the analogy used for purposes of understanding what is occurring in these cases. In the case of cleaning services, the cleaner merely returns to its customer a cleaned suit; no substantial transformation takes place, and no merchandise is being produced. Enrichment of uranium, however, is a critical step in the production of nuclear fuel. The production of uranium in the nuclear fuel cycle consists of five stages: mining, milling, conversion, enrichment, and fabrication. A distinct product is produced at each stage. Milled

3. *See* Respondents' Joint Case Brief, at 38, 39; *see also* Petitioners' Rebuttal Brief at 26.

uranium is converted into uranium hexafluoride. Uranium hexafluoride is used to produce enriched uranium. Enriched uranium is used to produce fuel rods. And fuel rods are used in nuclear-generating facilities to produce electricity. In the case of enrichment, it is uncontested that enrichment results in the production of two separate products: low enriched uranium and uranium tails (or depleted uranium which can be re-enriched to produce enriched uranium).

Respondents' and AHUG's reference to the term "services" in their arguments mischaracterizes the nature of the enrichment operations, and attempts to place a major manufacturing operation which produces merchandise squarely outside the realm of trade in goods, based solely upon the way in which particular sales of such merchandise are structured. We find, however, that regardless of whether the sale is structured as one of enrichment processing or LEU, in all cases the trade in LEU is a trade in goods, as the transactions in question result in the introduction of LEU into the commerce of the United States. Accordingly, the Department determines that all LEU produced in the investigated countries and entering the United States for consumption is subject to these investigations.

AHUG and respondents insist that the AD and CVD laws can only be applied where the sale of LEU occurs in a specific way (*i.e.*, where the merchandise is sold in a single transaction). AHUG further insists that the law is inapplicable because the utility companies cannot be

considered the sellers of subject merchandise since they do not sell LEU, but instead sell electricity to U.S. consumers. Accordingly, AHUG and respondents conclude that the law cannot apply because no entity sells the subject merchandise.

We disagree. It does not matter whether the producer/exporter sold subject merchandise as subject merchandise, or whether the producer/exporter sold some input or manufacturing process that produced subject merchandise, as long as the result of the producer/exporter's activities is subject merchandise entering the commerce of the United States. The first, and threshold, question we must ask is whether the merchandise entering the United States is subject merchandise. All else flows from this. The second question is what transaction does the Department look at to determine export price.

Further, we believe Congress intended the law to be applicable where the subject merchandise enters the commerce of the United States, even where the transaction for such merchandise does not take the form of a simple, single chain of commerce involving a solitary manufacturer/exporter, a single sales price, and a single unaffiliated purchaser in the United States. Congress enacted specific provisions that demonstrate a clear intent to make merchandise entering the United States subject to the law even though the sale by the exporter to the first unaffiliated purchaser is not a sale of subject merchandise. In constructed export price transactions involving further manufacturing, for example, subject

merchandise enters the United States, but through a process of further manufacturing, is often sold to the first unaffiliated purchaser in the form of non-subject merchandise. The form of the sale, however, does not prohibit the application of the law. To the contrary, to address those situations Congress enacted special provisions that require the Department to determine whether there are dumping margins and to apply duties, as appropriate, to such merchandise. *See* section 772(b) of Act. Even where the first sale to an unaffiliated purchaser is far removed from the subject merchandise that enters the commerce of the United States, such merchandise is covered under the law, and Congress enacted a specific provision establishing a basis for calculating export price. For example, where rollerchain constitutes the subject merchandise and enters the United States, but the first sale to an unaffiliated purchaser is the sale of a motorcycle that contains the rollerchain, the law is applicable to such entries of rollerchain. *See* section 772(e). *See also* SAA at 825.

While there is no specific statutory provision that dictates how the Department is to calculate the value of subject merchandise and the export price in the circumstances in these LEU investigations, the absence of such a provision does not render the law inapplicable where the facts demonstrate that the product in question enters into the commerce of the United States, as in this case.

*Appendix D*

*Use of the Term "Enrichment Services" in Other Legal Contexts*

In seeking to demonstrate that for the transactions at issue the enrichment companies provide enrichment services, perform a value-added service, and do not sell the subject merchandise, respondents contend that the U.S. government has advocated on behalf of USEC before U.S. domestic courts that enrichment contracts are contracts for services, and accordingly, that the Uniform Commercial Code (UCC), which only pertains to goods, does not apply to such contracts. Moreover, the parties contend that U.S. courts have ruled in USEC's favor, finding that the UCC did not apply to such transactions because they were sales contracts for services, not for goods. The parties conclude, therefore, that because the U.S. government has recognized that the sales in question are sales of services, to be consistent, the Department cannot apply the AD or CVD law to these transactions.

We do not view those determinations as relevant to the issue of whether LEU that enters the commerce of the United States is subject to the AD and CVD laws. The respondents and AHUG are mixing two entirely different statutory regimes, which play different roles and have different purposes. Other legal or regulatory regimes are not determinative of how the Department is to treat such transactions under the AD and CVD laws. For example, the court's finding in *Florida Power & Light Co.* v. *United States* that the transfer of title of uranium feedstock "does not rise to the level of

'procurement' or 'disposal' of property" was made in the specific context of determining the applicability of the Contract Disputes Act to government contracts and is not relevant, much less binding, for purposes of the application of the AD and CVD laws.[4] In *Barseback Kraft AB and Empress Nacional Del Urnaio, S.A.* v. *United States*, the court ruled that the UCC did not apply to the contracts at issue because the UCC does not apply to government contracts.[5] Moreover, the UCC addresses the rights and obligations of the parties to a specific contract, and is therefore not determinative of whether the overall trade is one involving goods or services. As a general principle, different terms can have different meanings under different statutes, and parties are entitled to make their claims pursuant to the case law and precedent of the particular relevant statute, even where those claims appear to be at odds with other claims made pursuant to the case law and precedent of another statute that has an entirely different purpose.

*Tolling*

Respondents and AHUG also seek to obtain an exemption under the law for the LEU at issue through the application of the Department's tolling regulation, set forth at 19 CFR 351.401(h).

We disagree with respondents'suggested interpretation for several reasons. First, we do not

4. 49 Fed. C1. 656 (2001) (No. 96-644C).

5. 36 Fed. C1. 691 (1996), *aff'd* 121 F.3d 1475 (Fed. Cir. 1997).

interpret section 351.401(h) of the Department's regulations to be relevant or applicable in determining whether merchandise entering the United States is subject to the AD and/or CVD laws. Instead, section 351.401, including subsection (h) on tolling, was intended to "establish certain general rules that apply to the calculation of export price, constructed export price and normal value," and not for purposes of determining whether the AD and/or CVD laws are applicable. *See* 19 CFR 351.401(a) (2000). Our interpretation that the tolling regulation is intended solely for purposes of calculating dumping margins is further supported by the absence of any parallel provision on tolling in the CVD regulations.

Furthermore, in practice, we have never applied, nor relied upon, section 351.401(h) to exempt merchandise from AD proceedings, nor have we ever applied the provision in CVD proceedings. Moreover, our application of the tolling regulation in *SRAMs from Taiwan* does not support AHUG's or respondents' claim for exemption from the AD and CVD laws.[6] In that case, we applied the tolling regulation, seeking to determine which party made the relevant sale of subject merchandise. We found that the U.S. design house made sales of subject merchandise to unaffiliated purchasers in the United States, and therefore based our determination of U.S. price and normal value upon the transactions made by

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6. *Static Random Access Memory Semiconductors From Taiwan: Redetermination on Remand*, (May 2, 2000). The text of this determination can be found on the Department's Internet site at http://ia.ita.doc.gov/remands/00-48.htm.

the U.S. design house. In that case, we applied AD duties to all entries of *SRAMs from Taiwan*, regardless of whether the U.S. design house or the Taiwan exporter made the sale of subject merchandise. Therefore, our decision in *SRAMs from Taiwan* establishes no basis for excluding the LEU in question from these investigations. Further analysis of the tolling regulation in these antidumping investigations for purposes of determining EP, CEP and NV is provided below.

*Temporary Import Bonds, Foreign Trade Zones, and American Goods Returned*

Respondents also cite the Department's treatment of subject merchandise entering the United States under Temporary Import Bonds (TIBs), into Foreign Trade Zones (FTZs), and as American Goods Returned, as examples of where subject merchandise enters the United States without being subject to duties, and to support their claim that the Department is not authorized to impose duties on subject merchandise unless there is a sale of such merchandise. However, these provisions cited by respondents are not instances in which the merchandise enters the United States for consumption without the imposition of AD and countervailing duties. By operation of law, goods entered under TIBs are prohibited from entering the United States for consumption. For FTZs, where the merchandise enters the United States for consumption, antidumping and countervailing duties are imposed. *See* 15 CFR 400.33(b)(2)(2000). The Department's treatment of goods entering FTZs or under TIBs is,

therefore, consistent with the practice that the AD and CVD laws apply to goods that enter the commerce of the United States.

With respect to American Goods Returned (AGR), this provision is only applicable to merchandise that has not been substantially transformed in another country. AGR only applies to U.S. merchandise that is further manufactured in minor respects in another country, such that the product that is returned to the United States is not substantially transformed. As discussed below, this provision is not applicable in this case.

*Substantial Transformation and Country of Origin*

Respondents also argue that the Department's country-of-origin rationale in this case is contrary to federal and international regulation of transactions involving uranium and enrichment services. Respondents state that the enrichment process does not wipe away the country of origin of the uranium; rather it remains the same for materials tracking purposes after enrichment as it was before enrichment. Respondents conclude that it is irrelevant that enrichment is a major manufacturing process and that the enrichment process constitutes substantial transformation of the uranium feedstock. Accordingly, respondents contend that the Department's conclusion as to the country of origin of the enrichment cannot be used to establish the country of origin of the unitary LEU, because LEU itself has two countries of origin, namely the country of origin of the uranium and that of the separative work unit.

We disagree. The Department's country-of-origin determinations are made pursuant to the agency's authority to determine the scope of its investigations and AD/CVD orders. In contrast, the federal and international regulation of transactions in uranium referred to by respondents reflect requirements adopted for purposes of non-proliferation. Thus, the Nuclear Regulatory Commission (NRC) tracks the origin of natural feedstock for the purpose of tracing the worldwide movement and ultimate disposition of the feedstock, while the U.S. Customs Service and the Department determine the country of origin for the merchandise entering the United States for purposes of tracking international commercial transactions and assessing duties. The NRC has no role in determining the country of origin for customs duty purposes. Moreover, the Department and the Customs Service make country-of-origin determinations for the product entering the United States, which in this case is LEU, not feedstock and SWU, as respondents suggest. Indeed, the Department has in the past determined in other proceedings covering uranium that the process of enrichment constitutes substantial transformation of the uranium, and therefore, that enrichment confers country of origin upon the product entering the United States for AD purposes.

In the current case, petitioners have indicated, and no party has disputed, that the enrichment of uranium accounts for approximately 60 percent of the value of the LEU entering the United States. We find that enrichment processing adds substantial value to the

natural uranium and creates a new and different article of commerce and therefore confers a different country of origin upon the product for purposes of the AD and CVD law.

As a final matter, the unfair trade laws must be applicable to merchandise produced through contract manufacturing, just as they are applicable to merchandise manufactured by a single entity. To do otherwise would contravene the intent of Congress by undermining the effectiveness of the AD and CVD laws, which are designed to address practices of unfair trade in goods, as well as have profound implications for the international trading system as a whole. To the extent that contract manufacturing can be used to convert trade in goods into trade in so-called "manufacturing services," the fundamental distinctions between goods and services would be eliminated, thereby exposing industries to injury by unfair trade practices without the remedy of the AD and CVD laws.

While the term "enrichment services" is common in the industry, the enrichment of uranium feedstock is no more a "service," as that term is normally understood in the international trading community, than a production process that results in the manufacture of textiles, semiconductors, or corrosion-resistant steel. An importer of textiles who provides yarn to a textile manufacturer may view the transaction as nothing more than the purchase of "weaving services." An importer of semiconductors who provides a patented design mask to a foundry to be pressed into a wafer for purposes of

making a microchip may view such a transaction as nothing more than the purchase of "pressing services." Similarly, an importer of corrosion-resistant steel who provides hot-rolled steel to a rolling mill may view the transaction as nothing more than the purchase of "rolling and coating services."

Yet, no matter what the purchaser chooses to call the transaction, and no matter what terms may be common in the industry, nothing can change the fundamental facts associated with all of these transactions. In each of these three cases, the purchaser has contracted out for a major production process that adds significant value to the input and that results in the substantial transformation of the input product into an entirely different manufactured product. We simply do not consider a major manufacturing process to be a "service" in the same sense that activities such as accounting, banking, insurance, transportation and legal counsel are considered by the international trading community to be services. Instead, we have always considered the output from manufacturing operations that result in subject merchandise being introduced into the commerce of the United States to be a good. The only questions we have grappled with in all these instances is who is the appropriate producer/seller of the merchandise and how to calculate export price and constructed export price.

While respondents and AHUG note that the practice in the uranium industry with respect to the transactions at issue was established long before the Department

initiated these investigations, in the Department's view, the issue we are addressing is unfair trade practices. In the Department's view, nothing in the statute in any way indicates that Congress did not intend the AD and CVD laws to be applicable to merchandise based upon the way in which parties structure their transactions for such goods entering the commerce of the United States.

In sum, the application of the AD and CVD laws does not depend upon whether a producer/exporter sells an input to the subject merchandise, or the subject merchandise itself, but rather whether the activities of the producer/exporter result in the subject merchandise being introduced into the commerce of the United States.

*Calculating Export Price, Constructed Export Price and Normal Value Comments of the Parties*

Respondents and AHUG contend that the Department must base its evaluation of dumping upon sales of the subject merchandise, which should reflect all elements of the merchandise's value. In terms of EP and CEP, these parties contend that the statute refers to the price at which the merchandise is sold by the producer or exporter. In addition, AHUG and respondents cite to the agency's decision in *SRAMs from Taiwan*, where the Department determined that the relevant sale under the tolling regulation must be the sale of subject merchandise reflecting the full value of such merchandise.

*Appendix D*

AHUG and respondents contend that the principles for determining which sales are relevant, as embodied in the tolling regulation and applied in the *SRAMs* case, are directly pertinent to deciding whether the sale of enrichment services by the respondents, and sales of services in general, can be treated as relevant for purposes of the AD law. These parties assert that the Department should determine that: (1) The enrichment companies do not produce or take title to the uranium feedstock; rather it is supplied to them in bailment; (2) the sale of enrichment does not constitute the relevant sale for purposes of determining EP and CEP because the sales in question do not reflect the full value of the subject merchandise; and (3) the respondents are not in a position to set the price of the product because such companies have no control over the full cost of LEU for the transactions at issue.

Petitioners respond that the respondents and AHUG place heavy emphasis on the Department's "relevant sale" discussion in the *SRAMs* case, which petitioners contend was not intended to provide the guiding precedent in a case where the U.S. customer obtains the raw materials in one transaction and exchanges them for finished goods in another transaction, as in these investigations. The petitioners state that the respondents' and AHUG's position is erroneous in claiming that the Department's redetermination in *SRAMs* compels the conclusion that the enricher does not make the "relevant sale" because its price does not include all of the cost components of the finished product. Moreover, they add, even if SWU transactions were

tolling transactions, the Department's tolling precedent does not establish that tolling transactions are outside the scope of the AD law.

Petitioners further contend that the fact that enrichers have control over the production process used to produce LEU under SWU contracts is relevant to the Department's determination with respect to the relevant sale, and contrary to the arguments raised by respondents and AHUG. Petitioners add that the issue of who controls the production of the finished product is a key factor in determining whether a party is a producer or toller.

With respect to the sales contracts, in their case brief, petitioners argued that the enrichers are actually sellers of LEU under both SWU and EUP contracts because in both arrangements the LEU is produced at an operating tails assay determined by the enricher, and therefore the enricher determines the amount of feed used, the amount of SWU actually applied, and the assay of the tails that will be produced. Petitioners further noted that, although a customer may designate a transactional tails assay in a SWU contract, but not in an EUP contract, there is not a significant difference. To illustrate this point, petitioners note that, by designating a transactional tails assay in a SWU contract, the customer determines only the amount of uranium feedstock it must provide to the enricher, and the amount per SWU the customer will pay. However, the customer's designation of the transactional tails assay does not determine the amount of uranium

feedstock used by the enricher or the amount of SWU actually used by the enricher. Petitioners maintain that this is determined by the operational tails assay used by the enricher in the production of LEU. Petitioners assert that enrichers operate in essentially the same manner when they produce LEU under contracts where the customers supply the uranium feedstock as they do when they produce LEU from their own uranium feedstock.

Respondents reject petitioners' assertion that enrichers are actually sellers of LEU based upon the utility's delivery of uranium feed material as a payment-in-kind of uranium for the natural uranium component of the LEU. Respondents contend that enrichment services contracts contain detailed payment terms, and establish a price for the enrichment services sold, but do not contain any provisions for a payment of uranium in any form. Respondents add that it is virtually impossible for a payment-in-kind to occur because title does not pass to the enricher while the uranium is being enriched. Moreover, they explain that if a payment of uranium were occurring, the enricher would have to recognize it as a payment in its financial statements, which they assert does not occur, as the Department verified. Finally, respondents note that, by adopting the payment-in-kind theory, the Department would create a contractual arrangement between parties that completely differs from the contract itself.

Respondents further dispute the petitioners' conclusion that the enricher's return of different

uranium rather than the exact material provided by the customer turns the transaction into a payment-in-kind. Respondents argue that, in determining whether a service is being performed, one must look at the essence of the transaction, and what the customer contracted to purchase, not what material is given back to the utility company. Furthermore, they state, because uranium is fungible, it makes no sense to require firms to identify each atom of uranium transported or processed. They note that, in a previous submission by the petitioners, USEC explicitly stated that uranium is a fungible commodity and that a fabricator may use its own inventory of enriched uranium or have enriched uranium delivered by other utility companies.

In addition, respondents contend that the Department did not base its dumping margin calculations upon the number of SWUs or the price per SWU, but instead treated the sale as if it were a sale of LEU. Respondents note that the Department's price calculation is based upon the quantity of uranium and the quantity of SWUs involved, which has no correlation with the agreed upon price per SWU. Respondents contend that in doing so the Department is changing the material terms fixed on the date of sale into one in which the terms are not fixed until a later date, and then unilaterally, by notification from the customer. Respondents contend that this violates the statutory requirement that the Department base its calculation on the actual costs reflected in the respondent's books and records, ignores the long-standing practice of making AD comparisons on a production or process-

neutral basis, and uses a methodology that is completely contrary to the date of sale methodology applied by the Department in the same cases.

Respondents also note that the Department assigned a value to the natural uranium in the Preliminary Determinations where no price was provided, notwithstanding that the uranium provided by the utility company was not a cost to the enricher, and was not charged to the customer at all. Respondents contend that the surrogate uranium cost that the Department used violated the statutory requirement that it base its calculation on the actual costs incurred. They reiterate that the cost of the uranium to the enricher is zero. The respondents add that, although the uranium is processed, it is never paid for by the enricher, nor is it considered revenue, nor does it appear in the enricher's books. Therefore, they contend, uranium may not be treated as a cost when calculating constructed value.

AHUG also contends that the SWU contracts are unequivocally contracts for services, arguing that the enrichers hold the LEU as bailees for their utility customers, and if a particular delivery of LEU does not contain the exact same physical feed as that delivered by the utility, it contains feed delivered to the enricher by another utility. Therefore, AHUG asserts, the fungibility of the feed does not alter the actual commercial terms of the contracts or the nature of the transaction.

AHUG also disagrees with the Department's preliminary determination that there is little commercial difference between EUP and enrichment contracts. AHUG contends that enrichment contracts require payment for enrichment services, and therefore, the contract does not reflect all elements of the value of the LEU delivered, as do the EUP contracts. Furthermore, AHUG contends that LEU production is usually arranged through three, not two transactions: the purchase of U3O8, a contract for conversion services, and a contract for enrichment services. In addition, AHUG argues that the Department proposes that U.S. utility contracts for the purchase of each of these components can be cumulated to derive an unfair price even in the absence of a sale of that LEU in the U.S. market that reflects all elements of its value. AHUG argues that this theory seems to state that when utility companies arrange for the production of LEU through these separate contracts, they are selling LEU to themselves. AHUG asserts that the Department is simultaneously attempting to attribute the utilities' transactions with the mining companies and the conversion service providers to the enrichers, even though the enrichers are not parties to those other transactions, have no control over the process, and receive none of the revenue from such sales. AHUG claims this theory cannot be supported.

Petitioners respond that, contrary to respondents' and AHUG's contentions, the contractual obligation of a customer in a SWU transaction to supply converted uranium is properly viewed as part of the *quid pro quo*

that the customer must provide in order to obtain LEU from the enricher. Petitioners add that there can be no question that provision of the natural uranium is like the payment of the cash price for the SWU, a contractual obligation that must be met by a utility purchaser under a SWU contract in order to acquire a wholly new product, *i.e,* LEU from the enricher.

Petitioners note that, in the preliminary determinations, the Department identified three factors that petitioners had cited in support of its position. First, with respect to warranties and guarantees, LEU and EUP are delivered under essentially the same type contract. Second, the enrichers do not use the specific feedstock supplied by a particular customer to produce LEU for that customer. Third, the enrichers, not the utility companies, control the process used to produce the LEU under either type of contract. Petitioners state that, contrary to respondents' criticism of the "essentially identical" language in the preliminary determinations, the Department was not saying that SWU and EUP contracts were identical in every respect, nor is it necessary for the Department to so find.

Respondents reject petitioners' arguments on whether the enricher controls the production process, arguing that the relevant question is not whether enrichers own and control the production process for LEU, but rather whether the customer is purchasing a service. Respondents add that, because the quantity of uranium feedstock to be supplied by the customer is set pursuant to the contract, for a specified tails assay, the

customer, not the enricher, has the control over its cost of supplying uranium feedstock.

*Discussion*

For these final determinations, we find that the enrichment companies are the only producers and exporters of the subject merchandise in these cases and, therefore, are the appropriate respondents for determining EP, CEP and NV. We will address the application of the Department's tolling regulation first, and then the nature and substance of the sales contracts at issue.[7]

*Tolling*

In establishing general rules for calculating EP, CEP and NV, we promulgated section 351.401(h) of our regulations to address the treatment of subcontractors and tolling operations under the AD law.[8] The purpose of the regulation is to enable the Department to identify

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7. This discussion addresses the concepts of export price, CEP, and who is the producer/exporter of the subject merchandise-all issues that are relevant under the antidumping law. We note that, under the countervailing duty law, section 771(5)(E)(iv) defines as a benefit the purchase of goods for more than adequate remuneration. Because we have determined that SWU contracts involve the purchase of LEU, we determine that these transactions constitute the purchase of goods.

8. *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27295, 27411 (May 19, 1997).

the appropriate seller of subject merchandise and foreign like product for purposes of calculating EP, CEP and NV. *SRAMS from Taiwan* ("The company that is the first "price setter" for subject merchandise is also the company that is the producer of the merchandise."). To that end, the tolling regulation states that the Department will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor (i) does not acquire ownership of the subject merchandise; and (ii) does not control the sale of subject merchandise. 19 CFR 351.401(h) (2000).

*Department Precedents*

In *SRAMs from Taiwan*, the key case relied upon by the respondents and AHUG, we addressed the issue of whether producer status should be conferred upon the U.S. design house or the Taiwan foundry. In that case, the issue for the Department was which sale—the sale by the design house or the sale by the foundry—should be used to calculate EP and CEP. The Department stated that "the "relevant sale" must be a sale by the company that owns the merchandise entirely, including all essential components, can dispose of the merchandise at its own discretion and, thus, controls the pricing of the merchandise and not merely the pricing of certain portions of production." *Id.* at 4.

In making the distinction between the sale by the foundry and the sale by the U.S. design house, we examined the role played by the foundries and design houses in the production of subject SRAMs, as well as

the nature of the product produced. We found that the design was not only an important component of the product, but in fact defined the essence of the finished product. Because the design house not only developed the design, but also controlled how it was used in production by the foundry and the way that the products incorporating it were distributed in the marketplace, the Department concluded that the design house directed the production of the subject merchandise. *Id.* at 5. In our view, the role played by each entity as well as the nature of the product produced are important considerations in identifying the appropriate party as the producer of the subject merchandise.

In addition, since the enactment of the tolling regulation, the Department has also recognized that the regulation "does not purport to address all aspects of an analysis of tolling arrangements." *Polyvinyl Alcohol from Taiwan: Final Results of Antidumping Duty Administrative Review,* 63 FR 32810, 82813 (June 16, 1998). In that case, we acknowledged that, in assessing whether a company is a producer, we are not restricted to the four corners of the sales contract. Moreover, we emphasized that we will make our decision as to whether a party is a producer or manufacturer for purposes of determining EP, CEP and NV based upon the totality of the circumstances. *Id.* In *Polyvinyl Alcohol from Taiwan,* we further recognized that, while examining the production activities of a party may not be decisive in every case, whether a party has engaged directly or indirectly in some aspect of production is an important consideration in identifying the appropriate party as the producer. *Id.* at 32814.

*Appendix D*

*Enrichment Companies Are Producers/Exporters of LEU*

In this case, we have determined that the enrichment companies are the producers and exporters of the subject merchandise for purposes of establishing EP, CEP and NV for several reasons. First, the enrichment process is such a significant operation that it establishes the fundamental character of LEU. Second, the enrichers control the production process to such an extent that they cannot be considered tollers in the traditional sense under the regulation. Third, utility companies do not maintain production facilities for the purpose of manufacturing subject merchandise. Finally, we find that the overall arrangement, even under the SWU contracts, is an arrangement for the purchase and sale of LEU. Each element is discussed further below. While no single factor is dispositive of our determination, on balance we have determined that the enrichment companies are the producers and exporters of the subject merchandise.

First, in this case it is the enricher who creates the essential character of the LEU. The enrichment process is not merely a finishing or completion operation, but is instead the most significant manufacturing operation involved in the production of LEU. Enrichment raises to a specified assay the level of U235 contained in the product. While the types of advanced technology used to perform this operation vary, without the enrichment process, one would not be able to separate the molecules necessary to produce LEU. Like the design mask in *SRAMs*, the enrichment process establishes the

essential features of the LEU, creating a clearly distinct product from uranium feedstock. Moreover, the enrichment process imparts the essential character of the product, LEU, and delineates the purpose for which the product is to be used. As noted above, LEU is a product for which there is virtually no alternative commercial use but as part of the nuclear fuel cycle. Without the enrichment of natural uranium, LEU could not be produced.

There are currently two technologies in use to enrich feedstock, gaseous diffusion and centrifuge. Each method requires a huge financial investment in facilities and a technically skilled work force. In fact, the centrifuge technology has been years in the making and has required millions of dollars in research. So highly specialized is it, and so expensive to develop, that three major European governments combined their resources to develop the technology and create Urenco. While there are hundreds of nuclear facilities around the world that require LEU for fabrication into fuel rods in order to operate their reactors, there are only five major enrichers in the world. This underscores the technological sophistication and expense required to enrich uranium into LEU. Adding to the expense and complexity of establishing an enrichment operation is an intricate web of national and international regulatory regimes and oversight commissions.

Enrichment facilities are similar to design houses in the semiconductor industry. It is the patented design of the mask that incorporates the intellectual property,

accounts for a substantial portion of the value, and constitutes the essence of the microchip. The design is what makes the chip and what gives it its unique function: storing memory and thus enabling a computer to operate. Just as the design imparts the essential characteristics of a microchip, enrichment imparts the essential characteristics of LEU.

Second, we find that enrichers not only have complete control over the enrichment process, but in fact control the level of usage of the natural uranium provided by the utility company. We are aware that SWU is universally defined as the standard measure of enrichment services. However, the definition of SWU further provides that it is the effort expended in separating a specified amount of feed into a specified amount of enriched uranium at a specified product assay and a specified amount of waste at a specified assay. In each of the contracts, while the amount of LEU being purchased is not expressly stated (unless it is an EUP contract) the product assay, tails assay, and number of SWU are specified. It is the precise combination of the product assay order and the number of SWUs specified in the SWU contract that results in an exact amount of LEU to be delivered over the life of the contract. The most important factor in determining whether the contract is fulfilled is whether the utilities receive the precise amount of LEU that results from the application of the SWU equation that is explicitly spelled out and agreed upon in the SWU contract. And it is this bottom line (*i.e.*, a precise amount of LEU delivered over the life of the contract) that forms the fundamental nature

of the agreement between buyer and seller in a SWU contract. With this understanding in mind, the enricher then has extraordinary leeway in determining the precise combination of SWU and feedstock to be used in the production of the LEU required by the SWU contract. The enricher's decision will depend upon such factors as the relative costs of electricity, feedstock, even the market price of "SWU," which, for all intents and purposes, trades like a commodity. As the record reflects, enrichers therefore run their facilities in a manner that they determine is most efficient.

For example, an enricher, in fulfillment of a SWU contract, may actually use more or less natural uranium and more or less SWU than is provided for in the contract (and by the utility customer). The enricher has complete control over these important production decisions. The utility company, on the other hand, provides the specifications and receives a product, as specified in the contract through the application of the SWU equation. Thus, the utility company obtains no more control over the production process than any customer who orders custom-made merchandise would obtain. In our view, the enricher has extensive control over the production process, and complete control over the amount of SWU or feed to be used in any given transaction. The extensive control further demonstrates that the enricher is not acting in a tolling capacity for the transactions at issue.

Third, in this case, the U.S. utility companies do not maintain production facilities for the purpose of manufacturing subject merchandise. Unlike the U.S.

design house in *SRAMs from Taiwan*, but like the U.S. importer in *Polyvinyl Alcohol from Taiwan*, the U.S. utility companies perform no manufacturing function whatsoever with respect to the production of LEU. These companies have no LEU manufacturing operations; no capital investment in production facilities; no employees dedicated to manufacturing LEU; and add no value to the product through the performance of manufacturing operations. Most important, we find that the utility companies are the only purchasers of LEU and can only obtain LEU from enrichment companies. By contrast, enrichment companies' sole activity is to produce LEU for use by utility companies.

Finally, we find that the overall arrangement under both types of contracts is, in effect, an arrangement for the purchase and sale of LEU. The parties have made a comprehensive comparison of the terms of the contracts for SWU and EUP, arguing that the terms of the contract demonstrate that the contracts designated as SWU sales are not, in fact, sales of LEU. While we recognize that the provision of uranium feedstock may not be a payment-in-kind in the formal sense under these contracts, we maintain that the arrangement between buyer and seller in a SWU contract nonetheless is dedicated to the delivery of LEU, and critical to the trade in LEU. In reaching this conclusion, we have looked beyond the four corners of the contract and have examined the totality of the circumstances surrounding the transactions in deciding which sale is a valid representation of subject merchandise.

*Appendix D*

*The Nature of the SWU Contract*

In this case, based upon the way in which the industry produces and sells LEU, we find that the overall arrangement between the parties indicates that enrichment companies are engaged in selling, and utility companies are engaged in purchasing, LEU. These transactions may be construed differently in other contexts, such as for purposes of taxation, or for purposes of establishing the liabilities of the parties to the contract. However, for purposes of calculating a price for LEU, based upon our examination of the overall circumstances of the arrangement under both types of contracts, we find that the contracts designated as SWU contracts are functionally equivalent to those designated as EUP transactions.

First, both types of transactions have one fundamental objective—the delivery of LEU at a specific time and location, with a specific product assay, as agreed upon in the contract, under the same warranties and guarantees that apply to all LEU delivered by respondents. Second, utility customers are not concerned with how LEU is produced or the amount of work expended (SWU) to produce such LEU. Instead, utility customers are interested in obtaining a specific quantity of a standardized product at a specified product assay. This pertains to both types of transactions. Indeed, SWU contracts are based upon a set formula that provides the utility company with a fixed quantity of LEU over the life of the contract.

Further, under both types of contracts, because the LEU is produced at an operating tails assay determined by the enricher, the enricher ultimately determines how much uranium feed is used, the amount of SWU actually applied, and the assay of the tails that will be produced. Thus, it is clear that enrichers not only exercise the same level of control over the production process for both types of contracts, but also perform the exact same manufacturing operations, regardless of whether the sale was made under a SWU contract or an EUP contract.

In addition, there are provisions in SWU contracts that further demonstrate that the underlying arrangement is designed to operate in much the same manner, regardless of the type of contract, and that whether the enricher or the utility company provides the uranium feedstock does not substantially alter that arrangement. These provisions are proprietary. *See, e.g.*, Urenco Business Proprietary Section A Response, Volume 1, Tab B1, Contract section F.3. Furthermore, for both types of contracts ownership of the LEU is only transferred to the utility customer upon delivery of the LEU. Consistent with this provision, for both types of transactions, the enricher incurs the risk of loss with respect to the LEU. In light of the above, therefore, we believe, as a practical matter, that the arrangement between the utility company and the enricher under a SWU contract is functionally equivalent to the arrangement under an EUP contract for purposes of determining EP and CEP.

*Appendix D*

Moreover, as discussed above, the enrichment companies engage in the most significant portion of the production of LEU, and thus the value of enrichment is beyond question the most significant element of value in determining the price of LEU. In addition, LEU, the subject merchandise, is the merchandise resulting from this production operation. Accordingly, we believe the pricing behavior of the enrichment companies in these transactions is relevant to the Department's determination of whether the LEU in question is introduced into the commerce of the United States at less than fair value.

Therefore, because the pricing behavior of the enrichers in these transactions is relevant to the Department's determination and because the arrangement between the utility company and the enricher under a SWU contract is functionally equivalent to the arrangement under an EUP contract for purposes of determining EP and CEP, we have included these sales in our determination of EP and CEP in these investigations.

In assigning a specific monetary value to the natural uranium component, we estimated the market value using the average price the enrichers charged their customers for natural uranium for LEU contracts. For SWU contracts, when comparing U.S. Price with Normal Value based on constructed value, we valued natural uranium using exactly the same value for both sides of the equation. For example, for any given shipment pursuant to a SWU contract we determined the quantity

(*i.e.* kgs) of associated feed uranium by applying the industry standard formula for product and tails assay specified in the contract. We valued this quantity using POI average per-kg price for natural uranium charged by enrichers. This exact same amount was included in normal value.

*Period of Investigation*

The period of investigation (POI) is October 1, 1999, through September 30, 2000. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition (*i.e.*, December 2000).

*Verification*

As provided in section 782(i) of the Act, we conducted verification of the sales information submitted by Cogema/Eurodif from July 23 through July 27, 2001, in France, and from August 13 through August 16, 2001, in the United States. We conducted verification of the constructed value (CV) information submitted by Cogema/Eurodif from July 30 through August 3, 2001. We used standard verification procedures including examination of relevant accounting and production records, and original source documents provided by the respondent.

*Analysis of Comments Received*

All issues raised in the case and rebuttal briefs by parties to this antidumping proceeding are listed in the

*Appendix D*

Appendix to this notice and addressed in the *Decision Memorandum* for this investigation, dated December 13, 2001, which is hereby adopted by this notice. The *Decision Memorandum* for this case is on file in room B-099 of the main Department of Commerce building. In addition, a complete version of the *Decision Memorandum* can be accessed directly on the World Wide Web at http://ia.ita.doc.gov/frn/summary/list.htm. The paper and electronic versions of the *Decision Memorandum* are identical in content.

*Changes Since the Preliminary Determination*

Based on our findings at verification and analysis of comments received, we have made adjustments to the calculation methodology in calculating the final dumping margins in this proceeding. These adjustments are discussed in detail in the *Calculation Memorandum,* dated December 13, 2001. For the final determination, we made the following revisions:

(1) We adjusted the transportation insurance amounts to account for the respondent's clerical errors.

(2) We adjusted movement expenses and U.S. duty charges for certain deliveries to correct the respondent's clerical errors.

(3) We revised the inventory carrying costs for various U.S. deliveries to account for the respondent's clerical errors.

(4) We adjusted the total cost of manufacturing reported in the U.S. sales database to be consistent with changes made to the total cost of manufacturing in the constructed value (CV).

(5) To reflect the opportunity cost of a particular contract provision exercised by one customer, we calculated an imputed expense and applied it to the indirect selling expense ratio of that customer, for all deliveries to the customer.

(6) Based on the respondent's revised calculation from verification, we adjusted the home market indirect selling expense ratio used to calculate indirect selling expenses added to CV.

(7) We recalculated the defluorination expenses included in CV based on the tails produced during the POI.

(8) We excluded purchased LEU from the calculation of the weighted-average cost of LEU produced in the POI.

(9) We recalculated the financial expense rate based on the financial statements of CEA Industrie, the entity that consolidates Cogema's accounts.

(10) We recalculated selling, general and administrative expenses to include certain research and development expenses.

*Appendix D*

*Final Determination of Investigation*

We determine that the following weighted-average percentage dumping margins exist for the period October 1, 1999, through September 30, 2000:

| Manufacturer/exporter | Margin (percent) |
|---|---|
| Cogema/Eurodif ..... | 19.57 |
| All Others ..... | 19.57 |

*Continuation of Suspension of Liquidation*

Pursuant to section 735(c)(1)(B) of the Act, we are instructing the U.S. Customs Service to continue to suspend liquidation of all entries of LEU from France that are entered, or withdrawn from warehouse, for consumption on or after July 13, 2001 (the date of publication of the *Preliminary Determination* in the **Federal Register**). The Customs Service shall continue to require a cash deposit or the posting of a bond equal to the estimated amount by which the normal value exceeds the U.S. price as shown above. The suspension of liquidation instructions will remain in effect until further notice.

*International Trade Commission Notification*

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (ITC) of

our determination. As our final determination is affirmative, the ITC will determine, within 45 days, whether imports of subject merchandise are causing material injury, or threaten material injury, to an industry in the United States. If the ITC determines that material injury or threat of injury does not exist, the proceedings will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping order directing Customs Service officials to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: December 13, 2001.

**Faryar Shirzad,**

*Assistant Secretary for Import Administration.*

**Appendix—Issues in Decision Memorandum**

1. Common antidumping and countervailing duty scope issues

2. Amendment of the scope to exclude imported enriched uranium consumed in the conversion or fabrication of exported uranium

*Appendix D*

3. Double-counting the subsidy in the calculation of the dumping margin

4. Treatment of "blended price" contracts

5. Calculation of the less than fair value (LTFV) margin based on delivered and undelivered sales

6. Valuation of electricity as a component of low enriched (LEU)

7. Whether to collapse Eurodif and Cogema

8. Whether defluorination costs are at arm's length

9. Accrual for tails disposal

10. Calculation of a constructed export price (CEP) offset

11. Recalculation of inventory carrying costs

12. Imputing certain expenses to Cogema/Eurodif

13. Selling, general and administrative (SG&A) expenses

14. Financial expenses

15. Purchased product

16. Constructed value (CV) profit

[FR Doc. 01-31509 Filed 12-20-01; 8:45 am]
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## APPENDIX E — AMENDED FINAL DETERMINATION BY THE DEPARTMENT OF COMMERCE DATED FEBRUARY 13, 2002

FEDERAL REGISTER

Vol. 67, No. 30

Notices

DEPARTMENT OF COMMERCE

International Trade Administration

Import Administration

**[A-427-818]**

**Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Low Enriched Uranium From France**

*67 FR 6680*

**DATE:** Wednesday, February 13, 2002

**EFFECTIVE DATE:** February 13, 2002.

**FOR FURTHER INFORMATION CONTACT:** Vicki Schepker or Edward Easton, Group II, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th

Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482-1756, (202) 482-3003, respectively.

**The Applicable Statute and Regulations**

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department of Commerce (the Department) regulations refer to the regulations codified at 19 CFR part 351 (April 2000).

**Scope of Order**

For purposes of this order, the product covered is all low enriched uranium (LEU). LEU is enriched uranium hexafluoride ($UF_6$) with a $U^{235}$ product assay of less than 20 percent that has not been converted into another chemical form, such as $UO^2$, or fabricated into nuclear fuel assemblies, regardless of the means by which the LEU is produced (including LEU produced through the down-blending of highly enriched uranium).

Certain merchandise is outside the scope of this order. Specifically, this order does not cover enriched uranium hexafluoride with a $U^{235}$ assay of 20 percent or greater, also known as highly enriched uranium. In addition, fabricated LEU is not covered by the scope of

this order. For purposes of this order, fabricated uranium is defined as enriched uranium dioxide ($UO^2$), whether or not contained in nuclear fuel rods or assemblies. Natural uranium concentrates ($U_3O_8$) with a $U^{235}$ concentration of no greater than 0.711 percent and natural uranium concentrates converted into uranium hexafluoride with a $U^{235}$ concentration of no greater than 0.711 percent are not covered by the scope of this order.

Also excluded from this order is LEU owned by a foreign utility end-user and imported into the United States by or for such end-user solely for purposes of conversion by a U.S. fabricator into uranium dioxide ($UO_2$) and/or fabrication into fuel assemblies so long as the uranium dioxide and/or fuel assemblies deemed to incorporate such imported LEU (i) remain in the possession and control of the U.S. fabricator, the foreign end-user, or their designed transporter(s) while in U.S. customs territory, and (ii) are re-exported within eighteen (18) months of entry of the LEU for consumption by the end-user in a nuclear reactor outside the United States. Such entries must be accompanied by the certifications of the importer and end user.

The merchandise subject to this order is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 2844.20.0020. Subject merchandise may also enter under 2844.20.0030, 2844.20.0050, and 2844.40.00. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

*Appendix E*

**Amended Final Determination**

In accordance with section 735(a) of the Act, on December 21, 2001, the Department published its affirmative final determination of the antidumping duty investigation of low enriched uranium from France (*Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium from France*, 66 FR 65877). On December 26, 2001, we received ministerial error allegations, timely filed pursuant to § 351.224(c)(2) of the Department's regulations, from the petitioners[1] regarding the Department's final margin calculations. On December 31, 2001, we received rebuttal comments from the respondent, Compagnie Generale des Matieres Nucleaires (Cogema) and Eurodif, S.A. (Eurodif).

The petitioners allege that the Department should recalculate Eurodif's general and administrative (G&A) expense, by using Eurodif's, rather than Cogema's, cost of goods sold as the denominator in the calculation. The respondent argues that the petitioners' allegation is a substantive issue that cannot be treated under the ministerial error provision.

In accordance with section 735(e) of the Act, we agree that a ministerial error in the calculation of the G&A expense ratio was made in our final margin calculation.

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1. The petitioners in this investigation are USEC, Inc., and its wholly-owned subsidiary, United States Enrichment Corporation (collectively USEC); and the Paper Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC, Local 5-550 and Local 5-689 (collectively PACE).

For a detailed analysis of this allegation, and the Department's determination, see the January 10, 2001, Memorandum to Bernard T. Carreau from Constance Handley, regarding the *Amended Final Determination in the Antidumping Duty Investigation of Low Enriched Uranium from France: Ministerial Error Allegations* on file in room B-099 of the Main Commerce building. This determination is based on a reexamination of the G&A expense calculation.

We are amending the final determination of the antidumping duty investigation of low enriched uranium from France to correct the ministerial error. The revised final weighted-average dumping margins are shown below.

**Antidumping Duty Order**

On February 4, 2002, in accordance with section 735(d) of the Act, the International Trade Commission (ITC) notified the Department that a U.S. industry is materially injured within the meaning of section 735(b)(1)(A) of the Act by reason of imports of low enriched uranium from France.

Therefore, antidumping duties will be assessed on all unliquidated entries of low enriched uranium from France entered, or withdrawn from warehouse, for consumption on or after July 13, 2001, the date on which the Department published its preliminary affirmative antidumping duty determination in the **Federal Register** (66 FR 36743), and before January 9, 2002, the date the

Department instructed the U.S. Customs Service to discontinue the suspension of liquidation in accordance with section 733(d) of the Act, and on all entries and withdrawals of subject merchandise made on or after the date of publication of this antidumping duty order in the **Federal Register**. Section 733(d) states that the suspension of liquidation pursuant to a preliminary determination may not remain in effect for more than four months, unless exporters representing a significant proportion of exports of the subject merchandise request that the period be extended to not more than 6 months. As noted in the preliminary determination (66 FR 36743), the respondent made such a request on July 2, 2001. Therefore, entries of low enriched uranium made on or after January 9, 2002, and prior to the date of publication of this order in the **Federal Register**, are not liable for the assessment of antidumping duties due to the Department's discontinuation, effective January 9, 2002, of the suspension of liquidation.

In accordance with section 736 of the Act, the Department will direct U.S. Customs officers to reinstitute the suspension of liquidation for low enriched uranium from France effective the date of publication of this notice in the **Federal Register** and to assess, upon further advice by the Department pursuant to section 736(a)(1) of the Act, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the export price or constructed export price of the merchandise for all relevant entries of low enriched uranium from France.

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On or after the date of publication of this notice in the **Federal Register**, U.S. Customs officers must require, at the same time as importers would normally deposit estimated duties on this merchandise, a cash deposit equal to the rates noted below. The All Others rate applies to all producers and exporters of low enriched uranium from France not specifically listed below. The cash deposit rates are as follows:

| Exporter/manufacturer | Weighted-average margin percentage |
|---|---|
| Cogema/Eurodif | 19.95 |
| All Others | 19.95 |

The all others rate applies to all entries of the subject merchandise except for entries from exporters/producers that are identified individually above.

This notice constitutes the antidumping duty order with respect to low enriched uranium from France, pursuant to section 736(a) of the Act. Interested parties may contact the Central Records Unit, Room B-099 of the main Commerce building, for copies of an updated list of antidumping duty orders currently in effect.

This order is issued and published in accordance with section 736(a) of the Act and 19 CFR 351.211.

*Appendix E*

Dated: February 6, 2002.

**Bernard T. Carreau,**

*Acting Assistant Secretary for Import Administration.*

[FR Doc. 02-3538 Filed 2-12-02; 8:45 am]
BILLING CODE 3510-DS-P

## APPENDIX F — OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE DECIDED MARCH 25, 2003

### UNITED STATES COURT OF INTERNATIONAL TRADE

Court Nos. 02-00112, 02-00113, 02-00114, 02-00219, 02-00221, 02-00227, 02-00229, 02-00233

USEC INC. and UNITED STATES ENRICHMENT CORPORATION,

Plaintiffs,

v.

UNITED STATES,

Defendant.

March 25, 2003, Decided

Before: POGUE, WALLACH, and EATON, Judges.

### OPINION

**Pogue, Judge**: Plaintiffs Eurodif, S.A., COGEMA, COGEMA Inc. (collectively, "Cogema"), Urenco Limited, Urenco Deutschland GmbH, Urenco Nederland B.V., Urenco (Capenhurst) Ltd. and Urenco, Inc. (collectively, "Urenco"), [1] challenge the final affirmative antidumping

1. Plaintiffs appear alternatively as Defendant-Intervenors in actions brought by USEC Inc. and the United States Enrichment Corporation challenging these final determinations. These actions have been consolidated as Court Numbers 02-

(Cont'd)

and countervailing duty determinations of the Department of Commerce ("the Department" or "Commerce") with regard to low enriched uranium ("low enriched uranium" or "LEU") from France, Germany, the Netherlands, and the United Kingdom. [2] Plaintiffs assert that the antidumping and countervailing duty laws do not apply to certain uranium enrichment transactions

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(Cont'd)

00221, 02-00227, 02-00229, and 02-00233, and the parties have submitted cross-motions for judgment on the agency record. The motions raise certain "general issues" which are addressed here. Pursuant to this Court's Scheduling Order of August 5, 2002, the parties have initially submitted opening briefs on these "general issues."

2. The challenged determinations are *Low Enriched Uranium from France*, 67 Fed. Reg. 6680 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination of sales at less than fair value and antidumping duty order); *Low Enriched Uranium from France*, 66 Fed. Reg. 65,877 (Dep't Commerce Dec. 21, 2001) (final determination of sales at less than fair value) *("LEU from France")*; *Low Enriched Uranium from France*, 67 Fed. Reg. 6689 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination and notice of countervailing duty order); *Low Enriched Uranium from France*, 66 Fed. Reg. 65,901 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determination); *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 67 Fed. Reg. 6688 (Dep't Commerce Feb. 13, 2002) (notice of amended final determinations and notice of countervailing duty orders); *Low Enriched Uranium from Germany, the Netherlands and the United Kingdom*, 66 Fed. Reg. 65,903 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determinations).

because the contractual arrangements involve purchases of enrichment services, rather than purchases of LEU as merchandise, and services fall outside the scope of the antidumping and countervailing duty laws. The Ad Hoc Utilities Group ("AHUG"), an association of twenty-two United States utilities that are consumers of low enriched uranium, seeks to intervene as of right in this action. *See* Mem. Supp. AHUG Mot. Intervene at 1 ("AHUG Intervention Mem."). This Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). For the reasons discussed below, we find that Commerce's determinations are neither supported by substantial evidence in the record nor in accordance with law.

**Background**

On December 7, 2000, USEC, Inc. and its wholly-owned subsidiary United States Enrichment Corporation (collectively, "USEC"), petitioned the Department of Commerce for initiation of antidumping and countervailing duty investigations into imports of low enriched uranium from France, Germany, the Netherlands, and the United Kingdom. On December 21, 2001, Commerce issued its final affirmative determinations in the antidumping and countervailing duty investigations of LEU from France and in the countervailing duty investigations of LEU from Germany, the Netherlands, and the United Kingdom. *See LEU from France*, 66 Fed. Reg. at 65,877; *Low Enriched Uranium from France*, 66 Fed. Reg. 65,901 (Dep't Commerce Dec. 21, 2001) (notice of final

affirmative countervailing duty determination); *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 66 Fed. Reg. 65,903 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determinations).

The antidumping and countervailing duty investigations initiated upon the petition of USEC covered "all low enriched uranium (LEU). LEU is enriched uranium hexafluoride ($UF_6$) with a $U^{235}$ product assay of less than 20 percent that has not been converted into another chemical form, such as $UO_2$, or fabricated into nuclear fuel assemblies, regardless of the means by which the LEU is produced." *LEU from France*, 66 Fed. Reg. at 65,877; *see also* Petition for the Imposition of Antidumping and Countervailing Duties on Low Enriched Uranium from France, Germany, the Netherlands and the United Kingdom, Jt. App. Tab 2-A at JA-1011-12 (stating the scope of the petition) ("Petition"). Low enriched uranium is a good, classifiable under headings 2844.20.0020, 2844.20.0030, 2844.20.0050, and 2844.40.00 of the Harmonized Tariff System of the United States ("HTSUS"). *See LEU from France*, 66 Fed. Reg. at 65,877; Petition, Jt. App. Tab 2-A at JA-1012-13. All parties to this action acknowledge that LEU itself is a good, and that trade in LEU may be subject to the application of the unfair trade laws. *See, e.g., LEU from France*, 66 Fed. Reg. at 65,878 ("{W}e found, and no party disputed, that LEU entering the United States constitutes a good, the tangible yield of a manufacturing

operation."); Pls.' Opening Br. Supp. Mot. J. Agency R. at 14 ("Pls.' Opening Br.").[3]

Low enriched uranium is used to produce nuclear fuel rods, which are used in nuclear reactors to produce electricity. *See LEU from France*, 66 Fed. Reg. at 65,879; Def.'s Resp. Opp'n Pls.' Mot. J. Agency R. at 5 ("Def.'s Resp."). Enrichment is the process by which the percentage of the fissionable isotope $U^{235}$ contained in uranium is increased. *See, e.g.*, Pls.' Opening Br. at 9-10; Def.'s Resp. at 4. Natural uranium contains approximately 0.711 percent of $U^{235}$; most nuclear utilities in operation require fuel with a $U^{235}$ concentration or "assay" between three and five percent. Pls.' Opening Br. at 9; Def.'s Resp. at 4-5.

The production of nuclear fuel involves: (1) mining uranium ore; (2) milling and/or refining the ore into uranium concentrate, referred to as natural uranium

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3. Title 19 U.S.C. § 1673 authorizes Commerce to impose antidumping duties where it "determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. § 1673 (2000). The language of the statute requires that there be a sale or likely sale at less than fair value in order for there to be a final determination. *See* 19 U.S.C. § 1673d(a)(1) ("The administering authority shall make a final determination of whether the subject merchandise is being, or is likely to be, sold in the United States at less than its fair value."). The Department interprets the statute to apply also to investigations of merchandise entered into the United States for "consumption." *LEU from France*, 66 Fed. Reg. at 65,878. We will assume, arguendo, that Commerce's interpretation is a reasonable one.

($U_{308}$); (3) converting the natural uranium into uranium hexafluoride ($UF_6$), or "feed uranium;" (4) enriching uranium hexafluoride to create low enriched uranium; and (5) using the low enriched uranium to fabricate nuclear fuel rods for use in nuclear reactors. *See* Pls.' Opening Br. at 9; Def.'s Resp. at 3-5; *LEU from France*, 66 Fed. Reg. at 65,879. The process of enrichment results in the creation of LEU, with its higher concentration of $U^{235}$, and depleted uranium or uranium "tails." Pls.' Opening Br. at 10; *LEU from France*, 66 Fed. Reg. at 65,879.

Nuclear utilities employ two types of contracts for procuring LEU from uranium enrichers. One is a contract for enriched uranium product ("EUP contract"), in which the utility simply purchases LEU from the enricher. *See LEU from France*, 66 Fed. Reg. at 65,878, 65,885; Pls.' Opening Br. at 13; Def.'s Resp. at 5. In an EUP contract, the price paid for the LEU covers all elements of the LEU's value, including the feed uranium and the effort expended to enrich it. Transcript of Dep't of Commerce Hearing (Oct. 31, 2001), Jt. App. Tab 6-A at 46 ("Hrg. Trans."); Pls.' Opening Br. at 13. All parties to this action agree that sales of enriched uranium product are sales of merchandise subject to the antidumping and countervailing duty laws. *See, e.g.*, Pls.' Opening Br. at 14 ("Movants do not question the application of the antidumping and countervailing duty laws to the sale of LEU.").

The second type of contract provides for the purchase of "separative work units" ("SWU") and also

provides for the delivery by the utility of a quantity of feed uranium to the enricher. *LEU from France*, 66 Fed. Reg. at 65,878, 65,884-85; Pls.' Opening Br. at 11-12; Def.'s Resp. at 5. A "separative work unit" is a measurement of the amount of energy or effort required to separate a given quantity of feed uranium into LEU and depleted uranium, or uranium "tails," at specified assays. *See LEU from France*, 66 Fed. Reg. at 65,884; Pls.' Opening Br. at 10 & n. 15; Def.'s Resp. at 5. In an SWU contract, the precise quantity of LEU purchased is not initially specified. Rather, the contract specifies the general terms of the transaction. Notices given during the contract term specify the quantity of SWUs, the product assay, and the tails assay. These specifications determine the material characteristics of the resultant LEU. *LEU from France*, 66 Fed. Reg. at 65,884; Pls.' Opening Br. at 11-12; Resp. Br. of USEC, Inc. Opp'n Cogema/Urenco Mot. J. Agency R. at 18 ("USEC Resp."). Specification of the product and tails assays by means of the notices given during the contract term permits the utility to determine how many SWUs it will pay for and how much feed uranium it will provide to the enricher. *See* Pls.' Opening Br. at 12 & n.20; USEC Resp. at 18; Hrg. Trans., Jt. App. Tab 6-A at 45-46. This allows the utility to "optimize the relative amounts of money and uranium it must provide for the LEU it will receive." USEC Resp. at 18; *see also id.* at 7 ("{T}he utility customer, by specifying the product assay and transactional tails assay . . . can control the total price it will pay and the amount of natural uranium it will provide."); Hrg. Trans., Jt. App. Tab 6-A at 45-46.

*Appendix F*

Feed uranium is fungible. *See, e.g.*, USEC Resp. at 17. Therefore, the specific feed uranium provided by a utility customer need not be used to produce LEU for that customer. *See id.* at 16 & n.21. Rather, enrichers maintain inventories of feed uranium, which is not segregated according to source or ownership. Any uranium held by the enricher may be used to produce LEU for any customer. *Id.* at 17; Def.'s Resp. at 5-6.

Utilities purchase feed uranium from third parties,[4] and prior to delivering the feed uranium to the enricher, the utilities have title, risk of loss, power to alienate or sell, and use and possession of the feed uranium. Title to feed uranium supplied to the enricher remains with the utility customer until the LEU is delivered, at which time title to the LEU is transferred to the utility. One contract states, for example, that "{t}itle to the Feed Material shall remain with {the utility} until the {LEU} Delivery associated with such Feed Material . . . at which time the Feed Material shall be deemed to have been enriched; whereupon {the utility} sha{ll} have title to such {LEU} associated with such Feed Material and title to such Feed Material will be extinguished." Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-F at JA-1364; *see also* Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-G at JA-1399. Pursuant to the SWU contracts, risk of loss or damage to the feed uranium, as well as use and possession, pass from the utility to the

4. Nothing in the record suggests that the parties from whom utilities purchase the feed uranium are in any manner related to the enrichers.

enricher upon delivery of the feed uranium to the enricher. Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-F at JA-1364; *see also* Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-G at JA-1399; Transcript of Oral Argument at 35 (Feb. 11, 2003) ("Oral Arg. Trans."). However, the enricher does not obtain title to the feedstock; rather, actual title is at all times with the utility. *See, e.g.*, Oral Arg. Trans. at 34. Nor does the enricher have the power to sell a utility's feedstock to a third party. *Id.* at 35. Moreover, it appears clear on this record that at the moment when the LEU is delivered to the utility by the enricher, the utility has title to and ownership of the LEU. *See* Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-F at JA-1361 (indicating that title to the LEU and all risk of loss or damage to pass from the enricher to the utility customer upon delivery of the LEU by the enricher); *see also* Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-G at JA-1401. The feed uranium does not become an asset of the enricher, nor is it ever reflected as such on the enricher's books and records.[5] *See, e.g.*, Oral Arg. Trans.

5. Commerce verified the foreign enrichers' records, which did not reflect payments for customer-provided uranium. Oral Arg. Trans. at 38. Furthermore, even though USEC has represented that, as an enricher, it receives feed uranium as consideration or "payment-in-kind" for the supply of LEU, USEC has required its utility customers to pay all property tax on what it views, correctly, as the "customer's feed." *See* Letter from Weil, Gotshal & Manges LLP to Hon. Norman Y. Mineta

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at 38. The contractual arrangement described above, in which utilities supply feed uranium and pay for the separative work performed as measured in SWUs, long predates the initiation of the challenged investigations. *See, e.g.*, Hrg. Trans., Jt. App. Tab 6-A at 43-45. During the 1960s and 1970s, the U.S. Department of Energy had a monopoly on enrichment services, but offered no other services relating to the production of nuclear fuel. *See id.* at 43. Consequently, utilities purchased enrichment services from the Department of Energy, but purchased feedstock from third parties. *Id.* at 43-45. In summary, utilities contract for each step of the nuclear fuel production process, including for enrichment. *Id.*

Commerce found during its investigations that enrichers were producers of LEU for purposes of the less-than-fair-value determination. In reaching its affirmative antidumping and countervailing duty determinations, Commerce concluded that EUP and SWU contracts were "functionally equivalent," in that "the overall arrangement under both types of contracts is, in effect, an arrangement for the purchase and sale of LEU." *LEU from France*, 66 Fed. Reg. at 65,884-85.

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(Dec. 20, 2000) at Ex. 2, Letter from USEC to Enrichment Customers (Nov. 19, 1998), Jt. App. Tab 5-B at JA-1885 ("USEC Property Tax Letter") ("USEC will report all the property that it owns at the two [gaseous diffusion plants] and will pay property tax accordingly. USEC does not intend to report any $UF_6$ to which it does not hold legal title."). The record does not indicate that the enrichers depreciated the customer-owned feed uranium or otherwise treated it as an asset.

The agency found that (1) the enrichment process is the "most significant manufacturing operation involved in the production of LEU" and that "it is the enricher who creates the essential character of LEU," *LEU from France*, 66 Fed. Reg. at 65,884; (2) the enrichers fully control the enrichment process, including the "level of usage of the natural uranium provided by the utility company," and therefore "cannot be considered tollers [or subcontractors] in the traditional sense under the regulation," *id.*; and (3) U.S. utility companies do not maintain production facilities for the enrichment of uranium. *Id.*

Plaintiffs argue that SWU contracts are transactions in services and therefore not subject to the antidumping and countervailing duty laws. *See, e.g.*, Pls.' Opening Br. at 7-9. Plaintiffs further assert that the petitions were not filed on behalf of the United States industry. *Id.* at 9. AHUG joins the plaintiffs in these assertions. *See* AHUG Intervention Mem. at 5-6; AHUG Opening Br. Supp. Mot. J. Agency R. at 7-8 ("AHUG Opening Br."). AHUG also claims that it is entitled to intervene as of right because its members are producers of LEU. AHUG Intervention Mem. at 5.

**Standard of Review**

This Court will sustain Commerce's determinations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

*Appendix F*

"Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 95 L. Ed. 456, 71 S. Ct. 456 (1951) (internal citation omitted); *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 16 L. Ed. 2d 131, 86 S. Ct. 1018 (1966). A decision will be reviewed on the grounds invoked by the agency, *see SEC v. Chenery Corp.*, 332 U.S. 194, 196, 91 L. Ed. 1995, 67 S. Ct. 1575 (1947), and the Court may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286, 42 L. Ed. 2d 447, 95 S. Ct. 438 (1974). The Court's function is not to re-weigh the evidence, but to ascertain whether the agency's determination is supported by substantial evidence on the record. *Matsushita Elec. Indus. Corp. v. United States*, 750 F.2d 927, 936 (1984).

*Appendix F*

## Discussion

### I. The Tolling Regulation, 19 C.F.R. § 351.401(h), and Commerce's Prior Decisions Related Thereto[6]

Title 19 U.S.C. § 1673 provides that antidumping duties may be imposed on imported merchandise where "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than fair value" and imports, sales, or likely sales of that merchandise result in injury or the threat of injury to the domestic industry, or in the material retardation of the establishment of the domestic industry. 19 U.S.C. § 1673.[7] In order to determine whether merchandise is

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6. Commerce argues that the issue of the applicability of the Department's tolling regulation is not a "general issue" and should therefore be postponed to a later stage in the proceeding. As we made clear in the Scheduling Order for this matter, issues which are not general include "challenges to the Department of Commerce's calculation results and methods." Scheduling Order at 5. While the initial applicability of the tolling regulation also has implications for the Department's calculation results and methods, it is more appropriately addressed as a general issue affecting the Department's threshold determinations. Accordingly, we address it here.

7. The statute states that antidumping duties shall be imposed where

> (1) . . . a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than fair value, and

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being sold or is likely to be sold in the United States at less than fair value, Commerce compares the merchandise's normal value, or the price at which the merchandise is first sold for consumption in the exporting country, to the export price or constructed export price, which represent the price of the good when sold in or for export to the United States.[8] *See* 19 U.S.C.

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(2) the Commission determines that —

(A) an industry in the United States —

(i) is materially injured, or

(ii) is threatened with material injury,

or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation.

19 U.S.C. § 1673. "The purpose underlying the antidumping laws is to prevent foreign manufacturers from injuring domestic industries by selling their products in the United States at less than 'fair value,' i.e., at prices below the prices the foreign manufacturers charge for the same products in their home markets." *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995).

8. "Export price" is defined as

the price at which the subject merchandise is first sold (or agreed to be sold) before the date of

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§ 1673; 19 U.S.C. § 1677a; 19 U.S.C. § 1677b(a). In order to determine export price or constructed export price, Commerce must determine which company is the producer or exporter of the merchandise. *See Taiwan Semiconductor Mfg. Co. v. United States*, 25 CIT __, __, 143 F. Supp. 2d 958, 966 (2001) ("In order to make a less-than-fair-value determination, Commerce must first determine the exporter or producer of the subject merchandise who controls the export price (or constructed export price) that Commerce compares to normal values to determine dumping margins.").

In determining who is the producer or exporter of subject merchandise, one factor Commerce considers is whether the merchandise is manufactured under a tolling or subcontracting arrangement. Title 19 C.F.R. § 351.401(h) states that Commerce "will not consider a

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> importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States.

19 U.S.C. § 1677a(a). "Constructed export price" is defined as

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.

19 U.S.C. § 1677a(b).

toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product."[9] 19 C.F.R. § 351.401(h). The regulation sets out "certain conditions under which {the agency} will not find that a toller or subcontractor is the producer of the subject merchandise." *Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. 32,810, 32,813, (Dep't Commerce June 16, 1998) (final results of antidumping duty administrative review). "{T}he purpose of the tolling regulation is to identify the seller of the subject merchandise for purposes of establishing export price, constructed export price, and normal value." *LEU from France*, 66 Fed. Reg. at 65,878. As observed by this Court, "Commerce's construction of 'producer,' as memorialized in {the regulation}, emphasizes three factors: (1) ownership of the subject merchandise; (2) control of the relevant sale . . .; and (3) control of production of the subject merchandise." *Taiwan Semiconductor Mfg. Co.*, 25 CIT at __, 143 F. Supp. 2d at 966. Thus, under the regulation, Commerce will not find tollers or subcontractors to be producers where such toller or subcontractor does not acquire ownership and does not control the relevant sale of the subject merchandise or foreign like product. The regulation "does not provide a basis to exclude

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9. "Relevant sale" is "the first sale in the distribution chain by the company that is in a position to set the price of the product, and by doing so, to sell at less than fair value in or to the U.S. market." *Taiwan Semiconductor, 143 F. Supp. 2d at 966* (quoting *Response to Court Remand, Taiwan Semiconductor Mfg. Corp., Ltd. v. United States* (Dep't Commerce June 30, 2000)).

merchandise from the scope of an investigation," *LEU from France*, 66 Fed. Reg. at 65,878, and "does not purport to address all aspects of an analysis of tolling arrangements." *Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. at 32,813. In making its producer determination, Commerce is "not restricted to the four corners of the contract" and will "look at the totality of the circumstances presented." *Id.*

Commerce has noted that "{t}ypically, the subcontracting, or tolling, addressed by this practice involves a contractor who owns and provides to the subcontractor a material input and receives from the subcontractor a product that is identifiable as subject merchandise." *Response to Court Remand, Taiwan Semiconductor Mfg. Corp., Ltd. v. United States*, Jt. App. Tab 7-A at JA-2604 (Dep't Commerce June 30, 2000) *("SRAMS Remand Response")*. The basis for treating the toller or subcontractor as a service provider and not the producer of the good is that the toller's price represents only the price for "some processing of the subject merchandise," not the "full cost of manufacturing." [10] *Polyvinyl Alcohol Mem.*, Jt. App. Tab

10. Commerce stated that

> Continuing to base the margin methodology on a toller's prices and/or costs for tolling only raises the issue as to whether such comparisons are consistent with the statute in determining the appropriate bases for normal value and export price, the definition of subject merchandise, and how we calculate dumping margins. The statute requires that

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7-F at JA-2730 (stating that Commerce prefers not to use tollers as respondents where a toller's price for the good does not "capture all the costs of production for producing the subject merchandise, as required by the statute"). Rather, the producer of the merchandise must be the company that "bears all essential costs from the inception of production through the time of the sale to the first customer. Because its pricing represents all elements of value, . . . this entity functions as the 'price setter' or potential price discriminator." *SRAMS Remand Response*, Jt. App. Tab 7-A at JA-2604.

In *Static Random Access Memory Semiconductors from Taiwan*, 63 Fed. Reg. 8,909 (Dep't Commerce Feb. 23, 1998) (notice of final determination of sales at less than fair value) *("SRAMS from Taiwan")*, a foundry manufactured SRAM wafers using a design and design mask supplied by a design house. The design house developed the design, which was the crucial element in

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> we base comparisons on the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold to the home or third country markets, not the price of some processing of the subject merchandise. Where cost of production and/or constructed value analysis is necessary, the statute requires that we calculate the full cost of manufacturing, not part of the cost of manufacture of the subject merchandise.

Dep't of Commerce Mem. from Team to Barbara R. Stafford, *Treatment of DuPont's Sales of Polyvinyl Alcohol Tolled by Chang Chun* Jt. App. Tab 7-F at JA-2730 (Aug. 8, 1995) *("Polyvinyl Alcohol Mem.")*.

the production of the SRAM wafer; retained ownership of the design as intellectual property; "arrange{d} and pa{id} for the production of" the design mask; and "{told} the foundry what and how much to make." *SRAMS from Taiwan*, 62 Fed. Reg. 51,442, 51,444 (notice of preliminary determination of sales at less than fair value). Commerce concluded that the foundry, TSMC, was a toller, or subcontractor, rather than the producer of the SRAMS. Pursuant to this Court's instruction to explain why it treated the foundry in *SRAMS from Taiwan* as a service provider and not the producer of the merchandise, Commerce stated that

> although a subcontractor may deliver to the contractor a product which, based on its characteristics, is subject merchandise, the price paid to the subcontractor may not represent the entire value of the subject merchandise, but merely represents a portion of that value. In fact, in most subcontracting arrangements, the contractor already owns an essential portion of the product, and thus the price paid is only for the work performed by the subcontractor; that is, the sale by the subcontractor is only a sale of the service it performed (and any inputs provided). Under these circumstances, we find that it is not appropriate to equate the price of a subcontractor's services (and material inputs) with the price of subject merchandise in a dumping analysis. Indeed, we do not consider the "sale" between the subcontractor and such

> a contractor to be a sale of subject merchandise at all. Rather, it is a sale of certain inputs and subcontracting services. It is the contractor's subsequent sale which is the relevant sale because that party owns the merchandise in its entirety and thus its sales price represents the full value of the subject merchandise.

*SRAMS Remand Response*, Jt. App. Tab 7-A at JA-2604. The agency noted that "the price from TSMC did not include an essential component of the product. Consequently, TSMC did not sell subject merchandise, but rather only sold inputs and fabrication services." *Id.* at JA-2605. The "essential component" not present in TSMC's pricing was the cost of the wafer design and design mask, which were provided to TSMC by the contractor. *Id.* at JA-2604-05.

Commerce further stated in the *SRAMS Remand Response* that

> we believe that the entity controlling the wafer design in effect controls production in the SRAMS industry. The design house performs all of the research and development for the SRAM that is to be produced. It produces, or arranges and pays for the production of, the design mask. At all stages of production, it retains ownership of the design and design mask. The design house then subcontracts the production of processed wafers with a foundry

> and provides the foundry with the design mask. It tells the foundry what and how much to make. The foundry agrees to dedicate a certain amount of its production capacity to the production of the processed wafers for the design house. The foundry has no right to sell those wafers to any party other than the design house unless the design house fails to pay for the wafers. Once the design house takes possession of the processed wafers, it arranges for the subsequent steps in the production process. The design of the processed wafer is not only an important part of the finished product, it is a substantial element of production and imparts the essential features of the product. The design defines the ultimate characteristics and performance of the subject merchandise and delineates the purposes for which it can be used.

*SRAMS Remand Response*, Jt. App. Tab 7-A at JA-2603. Commerce stated that it considered the foundry to be a subcontractor because "it did not acquire ownership of the SRAM design or the design mask, nor did it control the subsequent sale of the wafers." *Id.*

In *Polyvinyl Alcohol from Taiwan*, Commerce determined that under one contractual arrangement, the manufacturer of the subject merchandise, Chang Chun, was engaged as a toller or subcontractor, and therefore was not the producer of the subject merchandise for

purposes of calculating export or constructed export price. The contractor, DuPont, manufactured the primary input, shipped it to Taiwan for processing by Chang Chun according to specifications supplied by DuPont, and exported it from Taiwan back to the United States and to third countries. *See Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. 6,526, 6,527 (Dep't Commerce Feb. 9, 1998) (preliminary results of antidumping duty administrative review); *Polyvinyl Alcohol Mem.*, Jt. App. Tab 7-F at JA-2727. Commerce determined that under these circumstances, DuPont was the producer of the subject merchandise. *Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. at 6,527. Like the design house in *SRAMS from Taiwan*, DuPont (1) coordinated all aspects of the production of the good and (2) supplied materials to the subcontractor to be used in the manufacturing process.[11] *See Polyvinyl Alcohol from*

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11. Notably, in a second contractual setting in *Polyvinyl Alcohol from Taiwan*, Commerce determined that the same manufacturer, Chang Chun, was the producer of the subject merchandise, while the other company, Perry, was determined to be an importer and reseller. *See Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. at 6,527. The contractual arrangement under which Perry purchased and supplied input materials to Chang Chun was altered only after a finding of sales at less-than-fair-value by Chang Chun. *Id.* Perry purchased the inputs from a Chang Chun affiliate and arranged for their delivery to Chang Chun. *Id.* Perry did not and had never manufactured any chemicals or chemical inputs; it was merely an importer and reseller. *Id.* The crucial finding in *Polyvinyl Alcohol from Taiwan* was that, under the circumstances, Perry had simply restructured its payments to Chang Chun in an effort to

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*Taiwan*, 63 Fed. Reg. at 6,527 (preliminary results of antidumping duty administrative review); *Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. at 32,817 (final results of antidumping duty administrative review); *Polyvinyl Alcohol Mem.*, Jt. App. Tab 7-F at JA-2727.

Finally, in *Certain Forged Stainless Steel Flanges from India*, 58 Fed. Reg. 68,853 (Dep't Commerce Dec. 29, 1993) (notice of final determination of sales at less than fair value), Commerce determined that Akai, a contractor that did not engage in manufacturing operations, was the producer of the subject merchandised. *Id.* at 68,855. Akai "purchase{d} and maintaine{d} title (during the entire course of production) to the raw materials used for the production of the vast majority of the flanges," and also "direct{ed} and control{led} the manufacturing process" by providing specifications for the finished merchandise. 58 Fed. Reg. at 68,856. Commerce noted that "for the vast majority of the flanges produced . . . Akai controls the costs for all elements incorporated in the production of the flanges." *Id.*

The circumstances of the instant case largely resemble the tolling or subcontracting arrangements

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circumvent the antidumping duties. This is distinguishable from the instant case because here the utility purchases the feedstock from a party unrelated to the enricher, and therefore the purchase of the feedstock confers no economic benefit on the enricher. The contract here is not simply a restructured purchase contract.

seen in these earlier determinations. Like Akai in *Certain Forged Stainless Steel Flanges from India*, the utilities direct and control the process of producing the merchandise, i.e. nuclear fuel. *See, e.g.*, Hrg. Trans., Jt. App. Tab 6-A at 44-45. Using contractors at each step, they coordinate the production of uranium, LEU, and fuel rods. *Id.* As in *Polyvinyl Alcohol from Taiwan*, where the contracting company provided the material to be processed, the utilities provide the feed uranium to the enrichers and pay separately for the work performed, measured in SWUs. The utilities, by supplying the feed uranium, accept the risk of fluctuations in the price of $UF_6$ and can make the decision as to how much $UF_6$ versus how many SWUs to purchase in a given transaction. *See* Pls.' Opening Br. at 13 n.22 & sources cited therein. The contracts require the utility customer to provide the quantity of feed necessary to produce the desired quantity and assays of LEU. *See, e.g.*, French CVD Verification Exhibit C-1 (Oct. 23, 2001), [ ], Jt. App. Tab 4-A at JA-1507. As noted above, the utility customer retains title to the feed uranium until it is enriched. *See, e.g.*, Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-F at JA-1364; USEC Property Tax Letter, Jt. App. Tab 5-B at JA-1885-86 (noting that the utility customer is responsible for paying property taxes due on feed uranium stored by USEC on the utility's behalf). Upon enrichment and delivery of LEU, the title to the feed is considered extinguished and the customer gains title to the LEU. Significantly, the contracts for LEU state that once the separative work is performed and the LEU is delivered, "the Feed Material shall be

deemed to have been enriched; whereupon {the utility customer} sha{ll} have title to such {LEU} associated with such Feed Material and title to such Feed Material will be extinguished." Uranium Enrichment Services Uranium Enrichment Services Contract between [] and Urenco, Jt. App. Tab 3-F at JA-1364; *see also* Uranium Enrichment Services Contract between [] and Urenco, Jt. App. Tab 3-G at JA-1399.[12] These contractual provisions acknowledge the fungible nature of feed uranium while establishing a legal fiction that the enrichment process will be performed on the uranium provided by the customer. The SWU contracts indicate that the provision of feed uranium is not treated by the parties as a payment in kind, but the provision of specific material, owned by the customer, to be enriched. Accordingly, the contractual provisions, without more, do not support Commerce's interpretation that the provision of feed uranium is substantively a payment in kind. *See LEU from France*, 66 Fed. Reg. at 65,884-85 (indicating that while Commerce recognized that the provision of feed uranium under SWU contracts "may not be a payment-in-kind in the formal sense," it is substantively a payment in kind and is part of an "arrangement between buyer and seller . . . dedicated to the delivery of LEU").

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12. Defendant United States cites *NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir. 1997), for the proposition that a sale exists when there is "a transfer of ownership to an unrelated party and consideration." *NSK Ltd.*, 115 F.3d at 975; Def.'s Resp. at 58-59. As there is no finding that the enrichers' rights rise to the level of ownership, *NSK* is inapplicable.

*Appendix F*

The designation by the utilities of particular assays for the LEU and for uranium tails is analogous to DuPont's provision of specifications to Chang Chun in *Polyvinyl Alcohol from Taiwan*, and to Akai's control of the specifications in *Certain Forged Stainless Steel Flanges from India*. The designation of quantities and assays is based on (1) the design of the core reactor, which determines the level of $U^{235}$ needed by that reactor,[13] and (2) the utility's needs at a particular time, depending on its operating cycle and the amount of fuel that has been spent. *See, e.g.*, AHUG Intervention Mem. at 11. The utilities provide these specifications to the enricher, which then produces LEU in the required quantities and assays.

Commerce has previously indicated that control over the specifications of the final product was sufficient control to be considered a producer. Companies that did not engage in actual manufacturing processes have previously been held to be producers of subject merchandise. In *SRAMS from Taiwan*, discussed *supra*, the design house subcontracted the manufacturing of the wafer to a foundry. The design house created the design, retained ownership of the design throughout the production process, and provided manufacturing

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13. AHUG states that "{t}he specific level of $U^{235}$ needed is determined by each utility, based on the reactor core design it develops for its own reactors. In developing this design, the utility determines the number of fresh fuel assemblies and corresponding enrichment level necessary to produce the energy it needs until the next scheduled refueling date." AHUG Intervention Mem. at 11.

specifications to the foundry. *SRAMS from Taiwan*, 63 Fed. Reg. at 8,918 ("The design house . . . subcontracts the production of processed wafers with a foundry and provides the foundry with the design mask. It tells the foundry what and how much to make.") (quoting internal decision memorandum); *see also* text pp. 18-20, *supra*. Commerce found that the design house was the producer of the wafers. *Id.* at 8,918-19.

In *Certain Forged Stainless Steel Flanges from India*, the petitioners claimed that Akai, a company that did not engage in manufacturing operations, could not be the producer of the subject merchandise. 58 Fed. Reg. at 68,855. Commerce disagreed, stating that Akai was the producer of the subject merchandise because in addition to purchasing and retaining title to the raw materials used to produce the "vast majority" of the flanges, Akai also "direct{ed} and control{led} the manufacturing process insofar as it determines the quantity, size, and type of flanges to be produced." 58 Fed. Reg. at 68,856. Commerce noted that "for the vast majority of the flanges produced . . . Akai controls the costs for all elements incorporated in the production of the flanges." *Id.* Similarly, in *Certain Pasta from Italy*, 63 Fed. Reg. 53,641, 53,642 (Dep't Commerce Oct. 6, 1998) (preliminary results of new shipper antidumping duty administrative review), Commerce determined that the producer was a company that purchased all inputs, paid the subcontractor a processing fee, and maintained ownership of both the inputs and the final product at all times, as well as marketed the product and conducted product testing and marketing research.

Accordingly, if the text of 19 C.F.R. § 351.401(h) and Commerce's prior decisions were applied to the evidence on this record, the SWU contracts would be treated as contracts for the performance of services, and the enrichers would be treated as tollers and the utilities as the producers of LEU. Here, however, Commerce determined that the enrichers were the producers, offering three primary reasons for distinguishing this case from its prior decisions in cases involving tolling services. First, the agency asserted that "the enrichment process is such a significant operation that it establishes the fundamental character of LEU." *LEU from France*, 66 Fed. Reg. at 65,884. Yet in earlier cases involving tolling, it has also been the toller that created the "essential character" of the finished good by transforming the raw materials or inputs into the subject merchandise. In *Polyvinyl Alcohol from Taiwan*, the subcontractor Chang Chun transformed the material provided by DuPont into the final good, polyvinyl alcohol. See 63 Fed. Reg. at 6,527 ("DuPont . . . produces the main input, vinyl acetate monomer ('VAM'), which it then ships to Taiwan. Under contract with Chang Chun, the VAM is then converted into subject merchandise."). In *Certain Pasta from Italy*, the toller manufactured the subject pasta from the inputs supplied by the producer. *See* 63 Fed. Reg. at 53,642 ("Corex reports that it: (1) purchases all of the inputs, (2) pays the subcontractor a processing fee, and (3) maintains ownership at all times of the inputs as well as the final product."). Here, the enricher transforms feed uranium into LEU. Yet, as in the earlier cases, while its operations do create the "essential character" of LEU, the enricher does not acquire

ownership over either the feed or the final product, and neither its operations nor its pricing account for the full value of the finished LEU.

Second, Commerce distinguished the instant case from prior cases on the ground that "the enrichers control the production process to such an extent that they cannot be considered tollers in the traditional sense under the regulation." [14] *LEU from France*, 66 Fed. Reg. at 65,884. However, tollers normally, and in prior cases, control the operational process by which they perform the tolling services. Like the contractor Akai in *Certain Forged Stainless Steel Flanges from India*, the utility controls the specifications of the final product. *See* 58 Fed. Reg. at 68,856 ("{W}e have determined that Akai is the producer of this merchandise. . . . Akai purchases and maintains title . . . to the raw materials used for the production of the vast majority of the flanges, and . . .

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14. Commerce based this distinction in part on its conclusion that "the most important factor in determining whether the contract is fulfilled is whether the utilities receive the precise amount of LEU that results from the application of the SWU equation that is explicitly spelled out and agreed upon in the SWU contract." *LEU from France*, 66 Fed. Reg. at 65,884. In fact, the substantive provisions of the contracts are fulfilled by the purchase of the designated quantities of SWU, the enrichment of the uranium to the specified assay, and delivery of the LEU. *See, e.g.*, Contract for Uranium Conversion and Enrichment Services between [ ] and Cogema, Inc., Jt. App. Tab 3-C at JA-1255-58; Contract for Uranium Enrichment Services between [ ] and Cogema, Inc., Jt. App. Tab 3-E at JA-1297, JA-1299, JA-1301, JA-1303-05; Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-F at JA-1356.

directs and controls the manufacturing process insofar as it determines the quantity, size, and type of flanges to be produced."). As in *Certain Forged Stainless Steel Flanges from India*, the actual processes of creating the product are left within the control of the toller. *See id.*

Third, Commerce stated that "utility companies do not maintain production facilities for the purpose of manufacturing subject merchandise." *LEU from France*, 66 Fed. Reg. at 65,884. Yet under the circumstances of this case, the fact that the utilities do not maintain enrichment facilities does not appear to be significant. Commerce itself acknowledged the expense and technological sophistication involved in building and maintaining enrichment facilities. *See id.* (noting that each of the two technologies for enriching uranium feedstock, gaseous diffusion and centrifuge, "requires a huge financial investment in facilities and a technically skilled workforce. In fact, the centrifuge technology has been years in the making and has required millions of dollars in research. So highly specialized is it, and so expensive to develop, that three major European governments combined their resources to develop the technology and create Urenco."). Moreover, we note that the producers in *SRAMS from Taiwan*, *Certain Pasta from Italy*, and *Certain Forged Stainless Steel Flanges from India* did not maintain manufacturing facilities, and this fact did not prohibit the application of the tolling regulation. *See SRAMS Remand Response*, Jt. App. Tab 7-A at JA-2603; *Certain Pasta from Italy*, 63 Fed. Reg. at 53,642; *Certain Forged Stainless Steel Flanges from India*, 58 Fed. Reg. at 68,855. Finally, while the enricher

invests in the research and development necessary to develop and maintain separation facilities, we note that the foundry in *SRAMS from Taiwan* "conduct{ed} research and development related to process technology," but that this fact was not "controlling to {Commerce's} analysis." *SRAMS Remand Response*, Jt. App. Tab 7-A at JA-2606 n.3.

Commerce asserted in its final determination that "the overall arrangement, even under the SWU contracts, is an arrangement for the purchase and sale of LEU." *LEU from France*, 66 Fed. Reg. at 65,884. However, under any tolling arrangement, the "overall arrangement" is one for acquisition of a good, usually manufactured by the toller. Yet Commerce has previously distinguished toll-produced goods on the grounds that the toller does not acquire ownership, and the toller's price for its work does not represent the full value of the good. *See, e.g., SRAMS Remand Response*, Jt. App. Tab 7-A at JA-2603-04.

We cannot reconcile Commerce's prior distinctions between tolling services and sale of goods with the agency's statements in this case that EUP and SWU contracts are "functionally equivalent," and that "{i}t does not matter whether the producer/exporter sold subject merchandise as subject merchandise, or whether the producer/exporter sold some input or manufacturing process that produced subject merchandise, as long as the result of the producer/exporter's activities is subject merchandise entering the commerce of the United

States." *LEU from France*, 66 Fed. Reg. at 65,879, 65,885. Commerce's claim that the sole difference between enrichment transactions and sales of LEU under EUP contracts is the way such transactions are structured fails to take into account a critical difference between the two transactions: what is purchased.

Under EUP contracts, enrichers purchase their own uranium feed and enrich it for sale to the utilities as a complete product. Utilities pay the seller a price that reflects all elements of the value of the LEU: the value of the natural uranium and the amount of enrichment services, or SWU, performed.

Under SWU contracts, by contrast, the purchase price does not include the full value of the merchandise involved. Most significantly, such contracts do not include the cost or responsibility for providing the uranium feed, and no payment for the uranium is recognized on the enricher's financial statements, as would be the case if the enricher merely bought the uranium.[15] These types of transactions thus do not contemplate the sale of a complete product. Instead, enrichment contracts specify that the only payment to be made by the utility is for the enrichment services to be provided, on a price-per-

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15. The apparent reason for this structure is to allow a utility to control costs by determining how much feedstock it supplies, versus how many SWUs it pays for. *See, e.g.*, Pls.' Opening Br. at 10-12; AHUG Opening Br. at 11-12; Oral Arg. Trans. at 50, 57-58. No benefit flows to the enricher from the utility's supplying the feedstock.

SWU basis.[16] While the SWU prices may include certain incidental costs, they do not include the significant cost of the natural uranium, which is approximately 35 percent of enriched uranium's total value. *See* Petition, Jt. App. Tab 2-A at JA-1016. Commerce has recognized that where the price paid for subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping duty law. [17] Commerce's decision in the *SRAMS Remand Response* confirms this position. The statute requires a comparison of "the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold to the home or third country markets, not the price of some processing of the subject merchandise." *Polyvinyl Alcohol Mem.*, Jt. App. Tab 7-F at JA-2730.

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16. For example, the Uranium Enrichment Services Contract between [ ] and Urenco specifies as follows: [ ] Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-F at 1366. Further, the [ ] under a Cogema enrichment contract provides as follows: 12.3 [ ] Uranium Enrichment Services Contract between [ ] and Cogema, Inc., Jt. App. Tab 3-E at JA-1308.

17. The record does not indicate that Commerce analyzed the pricing provisions of the SWU contracts, or the structure of SWU transactions, in order to distinguish them from the pricing or transactional patterns found in the earlier cases involving subcontracting or tolling arrangements and in which 19 C.F.R. § 351.401(h) was found to apply.

*Appendix F*

While Commerce correctly states that 19 C.F.R. § 351.401(h) does not "exempt merchandise from {antidumping} proceedings," *LEU from France*, 66 Fed. Reg. at 65,880, the regulation is applicable in determining who is the producer in order to determine export price or constructed export price. Thus, a determination that the enricher provides a tolling service would mean that the price charged by the enricher to the utility for the enrichment cannot form the basis of the export price for the purpose of determining dumping margins.

It is well established that Commerce is authorized to depart from its prior practice as long as the agency articulates a "reasoned analysis" which demonstrates that the departure is supported by substantial evidence and in accordance with law. *Allegheny Ludlum Corp. v. United States*, 24 CIT __, __, 112 F. Supp. 2d 1141, 1147 (2000) (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)); *see also Asociacion Colombiana de Exportadores v. United States*, 22 CIT 173, 184-85, 6 F. Supp. 2d 865, 879-80 (1998) ("Commerce has the flexibility to change its position providing that it explain the basis for its change and providing that the explanation is in accordance with law and supported by substantial evidence."). Here, Commerce's decision not to apply the tolling regulation to a case that appears similar to earlier tolling cases, including *SRAMS from Taiwan* and *Polyvinyl Alcohol from Taiwan*, represents a departure from the practice authorized by a regulation "having the force and effect of law." *Allied Signal*

*Aerospace Co. v. United States*, 28 F.3d 1188, 1191 (Fed. Cir. 1994). As such, Commerce's decision requires a more persuasive explanation than provided in the agency's determinations.

In summary, Commerce's determination that enrichers are producers and not tollers is against the weight of the evidence on the record and inconsistent with both the agency's regulations and its prior decisions involving tolling services. Commerce's reasons for distinguishing the instant case, and consequently for declining to apply the tolling regulation, are not persuasive. Thus, Commerce's decision to treat these contracts as contracts for sales of a good is neither supported by substantial evidence nor in accordance with law.

## II. Industry Support

In determining that the antidumping and countervailing duty petitions regarding low enriched uranium had the requisite industry support, Commerce determined that enrichers, but not utilities, were producers of the subject merchandise.[18] *See Low*

18. 19 U.S.C. § 1673a(b)(1) provides that

> an antidumping proceeding shall be initiated whenever an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 1677(9) of this title files a petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the

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> imposition of the duty imposed by section 1673 of this title. . . .

19 U.S.C. § 1673a(b)(1).

19 U.S.C. § 1677(9) defines "interested party" as:

> (A) a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise,
>
> . . . .
>
> (C) a manufacturer, producer, or wholesaler in the United States of a domestic like product,
>
> (D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product,
>
> . . . .
>
> (F) an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) with respect to a domestic like product. . . .

19 U.S.C. § 1677(9).

In order to determine that a petition has the requisite industry support, Commerce must find that

> (i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and

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*Appendix F*

*Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom*, 66 Fed. Reg. 1,080, 1,081 (Dep't Commerce Jan. 5, 2001) (notice of initiation of antidumping duty investigations) ("Antidumping Initiation Notice"). Consequently, Commerce determined that petitioner USEC, as the sole domestic producer of LEU, "established industry support representing over 50 percent of total production of the domestic like product," and therefore the industry support requirement was fulfilled. *Id.*

Commerce employed a six-factor test used by the International Trade Commission to determine whether a company may be considered a "member of the domestic industry." Dep't Commerce Mem. from Melissa G. Skinner to Holly A. Kuga, *Determination of Industry Support for the Antidumping and Countervailing Duty Petitions on Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom*, Jt. App. Tab 1-A at JA-0007-08 (Dec. 27, 2000) *("LEU Industry Support Mem.")*. The test "focuses upon 'the overall nature' of production-related activities in the United States, to determine whether production operations are sufficient for a company to be considered a member of the domestic industry." *Id.* at JA-0008.

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> (ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.

19 U.S.C. § 1673a(c)(4)(A).

Commerce determined that the utilities were not producers of LEU because

> {t}hese companies do not engage in any type of manufacturing activities related to the production of LEU: they make no claim to have any LEU manufacturing operations; no capital investment in production facilities; they add no value to the product through the performance of any manufacturing operations; and have no employees dedicated to manufacturing.

*Id.* (citing *Brother Industries, Ltd. v. United States*, 16 CIT 1106 (1992) *aff'd*, 1 F.3d 1253, 1993 WL 283597 (Fed. Cir. 1993)). Rather, Commerce determined that the utility companies are "purchasers and industrial users of LEU." *Id.*

Commerce further asserted that the tolling regulation, 19 C.F.R. § 351.401(h), does not apply to determine who is a producer for the purposes of industry support. *See LEU Industry Support Mem.*, Jt. App. Tab 1-A at JA-0006. Commerce stated that

> we do not interpret section 351.401(h) . . . to be applicable to our determinations on industry support. Instead, . . . we find that section 351.401, including subsection (h) on tolling, was intended to "establish certain general rules that apply to the calculation of export price, constructed export price, and normal value," and not for purposes of

> determining industry support.... Our interpretation that the tolling regulation is intended for purposes of calculating antidumping margins is further supported by the absence of any parallel provision on tolling in the CVD regulations.

*Id.* (internal footnotes omitted).

Commerce further noted that

> In practice, moreover, the Department has never applied, nor relied upon, section 351.401(h) to determine industry support, with good reason. The purpose of the tolling regulation is to identify the party responsible for setting the price of subject merchandise sold to the United States.... By contrast, to determine industry support, the Department seeks to identify the entity or entities (or workers) that are engaged in the production or manufacture of the identical merchandise set forth in the petition. Thus, identifying the seller for purposes of respondent selection and identifying the domestic producers for purposes of industry support are separate questions that require different examinations for different purposes.

*Id.* at JA-0007.

*Appendix F*

Commerce's decision not to apply the tolling regulation to determine who is a producer in connection with its industry support determination is based on the agency's assessment of the purpose and context of the regulation. The Court acknowledges that the purpose of the tolling regulation is accurate calculation of export or constructed export price, and that the regulation does not arise in connection with the industry support determination. However, it is unclear from Commerce's explanation why the definition of "producer, " a term that is not statutorily defined, should differ between one subsection of the statute and another. Furthermore, it appears incongruous that Commerce may determine that the utility companies are not producers of LEU for the purpose of the industry support determination, but subsequently may determine, as a result of applying the tolling regulation, that the same companies are producers for the purpose of determining export price or constructed export price.[19] Where a term appears in

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19. When making an industry support determination, Commerce identifies the producers that make up the domestic industry. 19 U.S.C. § 1673a(c)(4); 19 U.S.C. § 1677(4)(A) ("The term 'industry' means the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."). When Commerce identifies the producer of subject merchandise for the purpose of determining export price or constructed export price and calculating the dumping margin, the agency is identifying a seller in the ordinary course of trade. *See* 19 U.S.C. § 1677b. Although we do not reach this issue, it would seem that if the word "producer" were to have a different definition in the context of

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multiple subsections within a statute, we "presume that Congress intended that the term have the same meaning in each of the pertinent sections or subsections of the statute, and we presume that Congress intended that Commerce, in defining the term, would define it consistently." *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001). Commerce is permitted to apply different definitions of such a statutory term only if it provides "an explanation sufficient to rebut this presumption." *Id.*

Consequently, as the Court is remanding the Department's determination for reconsideration of its decision not to apply the tolling regulation, Commerce also will have the opportunity to reconsider the effect of the tolling regulation on its industry support determination. If Commerce finds that the tolling regulation applies here, the agency must consider whether those entities determined to be "producers" under the tolling regulation are also "producers" for purposes of the industry support determination. Should Commerce determine that this is not the case, and that, in effect, a different definition of "producer" applies in the industry support context than in the context of the export price calculation, the agency is directed to articulate an appropriate basis for such a conclusion.

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the industry support determination than in the context of the export price determination, the industry support definition should be the more inclusive, not the more exclusive, because the purpose of the provision is to identify the industry as a whole.

*Appendix F*

## III. Applicability of the Countervailing Duty Statute

In deciding to apply the countervailing duty law to the subsidies it found to have benefitted Plaintiffs during the period of investigation, Commerce, relying on the same rationale it employed in applying the antidumping duty law, determined that because LEU was entering the United States for consumption, that merchandise was subject to countervailing duties:

> Similarly, in conducting countervailing duty investigations, {19 U.S.C. § 1671(a)(1)} requires the Department to impose duties if, *inter alia*, "the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, in the United States." We believe the statute is clear that, where merchandise from an investigated country enters the commerce of the United States, the law is applicable to such imports.

*LEU from France*, 66 Fed. Reg. at 65,879. Commerce went on to note that "under the countervailing duty law, {19 U.S.C. § 1677(5)(E)(iv)} defines as a benefit the purchase of goods for more than adequate remuneration. Because we have determined that SWU contracts involve the purchase of LEU, we determine that these

transactions constitute the purchase of goods." *Id.* at 65,883 n.7; *see also* 19 U.S.C. § 1677 (5)(E)(iv).

We have already determined that Commerce's determination regarding the "functional equivalency" of EUP and SWU contracts is not supported by the record. Accordingly, we cannot sustain the Department's determination that for the purposes of applying the countervailing duty statute, SWU contracts involve the purchase of LEU. Upon remand, the Department will have the opportunity to reconsider the application of its tolling regulations to the transactions at issue here. The Department therefore must reconsider its countervailing duty determinations in that context.

## IV. Intervention of the Ad Hoc Utilities Group

Intervention in antidumping and countervailing duty actions "is governed by Rule 24 of the Rules of this Court subject to the limitations in 28 U.S.C. § 2631(j)."[20] *Rhone Poulenc, Inc. v. United States*, 14 CIT 364, 365, 738 F. Supp. 541, 542 (1990) (citing *Manuli Autoadesivi, S.p.A. v. United States*, 9 CIT 24, 25, 602 F. Supp. 96, 97-98 (1985)). Title 28 U.S.C. § 2631(j)(1) provides that "{a}ny person who would be adversely affected or

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20. USCIT Rule 24 provides, inter alia, that a party may intervene as of right in an action when it "claims an interest relating to the property or transaction which is the subject of the action and . . . the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." USCIT R. 24(a).

aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action." However, subsequent subparagraphs limit this right. Title 28 U.S.C. § 2631(j)(1)(B) provides that, "in a civil action under section 516A of the Tariff Act of 1930, only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right." Additionally, under section 2631, "'interested party' has the meaning given such term in section 771(9) of the Tariff Act of 1930." 28 U.S.C. § 2631(k)(1). That section defines "interested party" as, inter alia, "a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States." 19 U.S.C. § 1677(9)(E).

Intervention in an action before this Court implicates the Court's jurisdiction and authority. Consequently, it is the Court that determines who is an "interested party" for the purpose of intervention. As noted in *Zenith Radio Corp. v. United States*, "{t}here is no presumption of standing in an area where Congress has provided explicit instructions on the subject." 5 CIT 155, 156 (1983) (internal citation omitted). Furthermore, as the Court observed, Commerce's decision to permit a party to participate in its investigative process, "even if done in terms of recognizing them as 'interested parties,' cannot control the Court's understanding of a matter primarily related to the invocation of its powers of judicial review." *Id.* "The agenc{y's} receptiveness to participation by various parties does not generate

standing for judicial review." *Id.* (internal citation omitted). This Court's decision as to whether AHUG's members are "interested parties" for purposes of intervention in the instant action does not depend upon the administrative determination as to the same question.[21]

AHUG participated in the administrative proceedings at issue here pursuant to 19 C.F.R. § 351.312, which permits "industrial users" of subject merchandise to submit "relevant factual information and written argument" to

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21. The government directs the Court's attention to *Rhone Poulenc, Inc. v. United States*, 14 CIT 364, 738 F. Supp. 541 (1990) in support of the proposition that this Court "is divided with respect to the question whether the agencies or the Court determines who is an 'interested party who was a party to the proceeding.'" Def.'s Resp. Opp'n AHUG Mot. Intervene at 11. In *Rhone Poulenc*, the Court determined whether a party was "an interested party who was a party to the proceeding," as required by 28 U.S.C. § 2631(j)(1)(B), by referring to Commerce's regulations governing who was a "party to the proceeding." *Rhone Poulenc*, 14 CIT at 365, 738 F. Supp. at 542. In Zenith Radio Corp., the Court denied a motion for intervention after determining that the applicants did not meet the statutory and regulatory definitions of interested parties. 5 CIT at 157. The applicants claimed that because the administrative agency had accepted their participation in its proceeding, they had standing to intervene in the action before the Court. The Court's decision in *Zenith* clarifies that, while the Court will look to the relevant statutes and regulations in determining who is eligible to bring or intervene in an action, the actions of the agency cannot bind the Court in connection with its determination of standing and the exercise of its jurisdiction. Consequently, there is no conflict between the Court's decisions in *Rhone Poulenc* and in *Zenith Radio Corp.*

Commerce. 19 C.F.R. § 351.312(b).[22] However, no provision of the statutes or regulations indicates that participation in the administrative proceeding as an "industrial user" is sufficient to meet the requirement of "party" to the proceeding under 28 U.S.C. § 2631.

Furthermore, we note that even if AHUG is considered to have been a "party" to the administrative proceeding

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22. Section 351.312 permits industrial users to "submit relevant factual information and written argument" under §§ 351.218(d)(3)(ii), (d)(3)(vi), and (d)(4), addressing sunset reviews; §§ 351.301(b), (c)(1), and (c)(3), addressing time limits; §§ 351.309(c) and (d), which permit "any *interested party* or U.S. Government agency" (emphasis supplied) to submit written argument in antidumping and countervailing duty proceedings; and § 351.309(e), which permits comments in connection with expedited sunset reviews. 19 C.F.R. § 351.312(b). The most pertinent section here is § 351.309, but it appears from the language of the regulation that AHUG would have to be an "interested party" within the meaning of the antidumping and countervailing duty statutes in order to make a submission. However, it is unclear why § 351.312 would grant the right to participate to "industrial users," who presumably are not "interested parties," and yet cross-reference another subsection requiring interested party status.

As USEC points out in its brief, USEC did not object to AHUG's participation in the administrative proceeding as an industrial user. *See* Resp. Br. of USEC Opp'n AHUG Mot. Intervene at 5. Additionally, the briefs submitted by both USEC and the Department of Justice in connection with AHUG's motion to intervene appear to assume that AHUG properly appeared in the administrative proceeding below. As the regulation is unclear, the Court will assume that AHUG properly participated in the administrative proceeding under 19 C.F.R. § 351.312.

within the meaning of 28 U.S.C. § 2631(j)(1)(B), the association still must meet the definition of "interested party," as required by 28 U.S.C. §§ 2631(j)(1)(B), 2631(k)(1). As noted earlier, "interested party" in this context is defined as, inter alia, "a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States." 19 U.S.C. § 1677(9)(E); *see also* 28 U.S.C. § 2631(k)(1).

Although Commerce acknowledged that the utility companies were "purchasers and industrial users of LEU," the agency determined they were not producers of LEU for purposes of industry support. *LEU Industry Support Mem.*, Jt. App. Tab 1-A at JA-0008. Yet as we are remanding to Commerce the question of the applicability of the tolling regulation, the question whether AHUG's members are "producers" of LEU within the meaning of the statute remains unresolved. Moreover, as discussed earlier in this opinion, application of the tolling regulation would result in a finding that the utilities are producers of LEU. *See supra* text at 26-35; 19 C.F.R. § 351.401(h). Accordingly, AHUG's members may be "producers" within the meaning of 19 U.S.C. § 1677(9)and 28 U.S.C. § 2631(k)(1).

Significantly, AHUG members, as purchasers and users of LEU, could be adversely affected by a decision in the instant case. 28 U.S.C. § 2631(j). The association has actively participated, to the extent permitted, throughout the administrative investigation, and the

views and concerns of AHUG's members may offer valuable insights in this litigation. Finally, AHUG's claims raise questions of law and fact common to those raised by the plaintiffs, who are mandatory parties here.

As noted above, a decision by Commerce regarding a party's status for purposes of participation in the agency's investigative process "cannot control the Court's understanding of a matter primarily related to the invocation of its powers of judicial review." *Zenith Radio Corp.*, 5 CIT at 156. Under the facts presented in this case, because AHUG's members may be "producers" of LEU within the meaning of 19 U.S.C. § 1677(9) and 28 U.S.C. § 2631(k)(1), and therefore entitled to intervene as of right, we will grant AHUG's motion to intervene as an "interested party who was a party to the proceeding in connection with which the matter arose." 28 U.S.C. § 2631(j)(1)(B).

**Conclusion**

In summary, we find that Commerce's decision not to apply the tolling regulation to the SWU contracts between enrichers and utilities, as well as its industry support determination, were neither supported by substantial evidence nor in accordance with law. The Court remands these matters to Commerce for further proceedings consistent with this opinion. Remand results are due seventy-five days from the date of this decision. All parties may file responses thereto within twenty days

after the filing thereof. All parties may reply to any responses within seven days after the filing thereof. Finally, AHUG's motion to intervene in the instant action is granted.

## APPENDIX G — FINAL REMAND DETERMINATION BY THE DEPARTMENT OF COMMERCE DATED JUNE 23, 2003

Public Version

FINAL
REMAND DETERMINATION
*USEC Inc. and United States Enrichment Corporation v. United States*
Court Nos. 02-00112, 02-00113, 02-00114 and
Consol. Court Nos. 02-00219, 02-0000221,
02-00227, 02-00229, and 02-00233
Slip Op. 03-34, (March 25, 2003)

### SUMMARY

This remand determination, submitted in accordance with the order of the U.S. Court of International Trade on March 25, 2003 (Slip Op. 03-34), involves challenges to the initiations and final affirmative determinations by the U.S. Department of Commerce (the Department) in the antidumping and countervailing duty investigations on low enriched uranium from France, Germany, the United Kingdom, and the Netherlands. *Notice of Initiation of Antidumping Duty Investigations: Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom*, 66 FR 1080 (Jan. 5, 2001); *Notice of Initiation of Countervailing Duty Investigations: Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom*, 66 FR 1085 (Jan. 5, 2001); *Notice of Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium From France*, 66 FR 65877 (Dec. 21, 2001) *("Final French AD Determination"); Notice of Final*

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*Affirmative Countervailing Duty Determination: Low Enriched Uranium From France*, 66 FR 65901 (Dec. 21, 2001); and *Notice of Final Affirmative Countervailing Duty Determinations: Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 66 FR 65903 (Dec. 21, 2001).

The challenges pertain to the Department's interpretation and application of its "tolling or subcontractor" regulation, 19 C.F.R. § 351.401(h), for purposes of determining industry support; for selecting the exporters or producers for purposes of establishing export and/or constructed export price, and normal value; and for purposes of determining whether the government of France has purchased goods, as compared to services, for more than adequate remuneration.

**BACKGROUND**

On December 21, 2001, the Department published notices of final affirmative determinations in the antidumping duty investigation on low enriched uranium from France, and in the countervailing duty investigations on low enriched uranium from France, Germany, the Netherlands, and the United Kingdom. *Final French AD Determination*, 66 FR 65877 (Dec. 21, 2001); and *Notice of Final Affirmative Countervailing Duty Determination: Low Enriched Uranium From France*, 66 FR 65901 (Dec. 21, 2001); and *Notice of Final Affirmative Countervailing Duty Determinations: Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 66 FR 65903 (Dec. 21, 2001).

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On March 25, 2003, the U.S. Court of International Trade (the Court) issued an opinion in the above cases, remanding the above issues to the Department for further explanation and consideration of its determinations. *USEC Inc. and United States Enrichment Corp. v. United States*, Slip Op. 03-34, (Mar. 25, 2003). The Court's opinion on each of the issues is summarized in the particular sections of this redetermination.

On June 6, 2003, the Department issued a draft remand redetermination in the above cases. Comments pertaining to the Department's draft redetermination were filed on June 13, 2003, by Urenco and Eurodif in a combined submission; USEC; PACE, on behalf of the domestic workers; and the Ad Hoc Utilities Group (AHUG) on behalf of U.S. utility companies.

## A. INDUSTRY SUPPORT

### a. *The Department's Decision to Initiate the AD and CVD Investigations on LEU*

In making its decision to initiate the investigations on low enriched uranium, the Department was required to determine whether the petitions were "filed by or on behalf of the industry." [1] To do so, the statute directs the Department to determine whether there is sufficient support for the petition by "the domestic producers or

1. Under the countervailing duty law, section 702(c)(4) of the Tariff Act of 1930 ("the Act"); and for the antidumping duty law, section 732(c)(4) of the Act.

workers" who are eligible to file a petition. To determine whether a company qualifies as a "domestic producer," the Department "examines production operations to determine whether a company qualifies as a producer of the domestic like product." *Determination of Industry Support for the Antidumping and Countervailing Petitions on Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom* (Dec. 27, 2000) ("*LEU Industry Support Mem.*"), at 8. The Department stated that "[a]t a minimum, a finding that a company is a producer of the domestic like product requires that a company perform some important or substantial manufacturing operation." *Id.* at 7. To determine whether a company may be a member of the domestic industry, the Department adopted the same test the U.S. International Trade Commission (ITC) employs to determine the appropriate domestic industry for purposes of its injury investigation, analysis and determination. To make its determination, the ITC examines a company's "production related activities in the United States." The Department noted that the ITC's six-factor test "focuses upon the 'overall nature' of the production related activities in the United States, to determine whether production operations are sufficient for a company to be considered a member of the domestic industry." *Id.* at 8. *See, e.g., Certain Cut-to-Length Steel Plate from France, India, Indonesia, Italy, Japan, and Korea*, Inv. Nos. 701-TA-387-391 and 731-TA-816-821 (Final), USITC Pub. 3273 at 8-9 (Jan. 2000). The Department stated that "[t]he Commission typically considers six factors: (1) the extent and source of a firm's capital investment; (2) the technical expertise

involved in U.S. production activity; (3) the value added to the product in the United States; (4) employment levels; (5) the quantities and types of parts sourced in the United States; and (6) any other costs and activities in the United States leading to production of the like product." *LEU Industry Support Mem.*, at 8.

In applying the test, the Department found USEC to be the sole producer of the domestic like product based upon its analysis of USEC's manufacturing operations. *Id.* at 5. The Department found that "USEC performs all of the processes necessary for enriching converted uranium." *Id.* at 8. The Department concluded that:

> In light of the fact that USEC is the only entity in the United States that enriches converted uranium to produce LEU; is the only entity with the technology and technical expertise to produce LEU; that enrichment is a necessary and major manufacturing operation in the production of LEU; and that the product output from USEC's enrichment facilities constitutes the domestic like product, we find that USEC is the only producer of LEU in the United States.

*Id.* at 5.

In reaching this conclusion, the Department also determined that the agency's regulation on the treatment of subcontractors and "tolling," 19 C.F.R. § 351.401(h), was not applicable for purposes of making

industry support determinations.[2] The Department reasoned as follows:

> First, we do not interpret section 351.401(h) of the Department's regulations (*i.e.*, the "tolling regulation") to be applicable to our determinations on industry support. Instead, consistent with the language of the regulation, we find that section 351.401, including subsection (h) on tolling, was intended to "establish certain general rules that apply to the calculation of export price, constructed

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2. **SUBPART D - CALCULATION OF EXPORT PRICE, CONSTRUCTED EXPORT PRICE, FAIR VALUE AND NORMAL VALUE**

**§ 351.401 In General**

(a) *Introduction.* In general terms, an antidumping analysis involves a comparison of export price or constructed export price in the United States with normal value in the foreign market. This section establishes certain general rules that apply to the calculation of export price, constructed export price and normal value. (*See* section 772, section 773, and section 773A of the Act.)

* * *

(h) *Treatment of subcontractors ("tolling" operations).* The Secretary will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product.

19 C.F.R. § 351.401 (2000).

> export price and normal value," and not for purposes of determining industry support. Our interpretation that the tolling regulation is intended for purposes of calculating antidumping margins is further supported by the absence of any parallel provision on tolling in the CVD regulations.

The Department also examined the purpose of the provisions in which the term "producer" appeared, and set forth its rationale for not applying the tolling regulation in its industry support analysis, stating as follows:

> In practice, moreover, the Department has never applied, nor relied upon, section 351.401(h) to determine industry support, with good reason. The purpose of the tolling regulation is to identify the party responsible for setting the price of subject merchandise sold in the United States. Under section 351.401(h), therefore, the Department focuses on which party controls the relevant sale of the subject merchandise or foreign like product. By contrast, to determine industry support, the Department seeks to identify the entity or entities (or workers) that are engaged in the production or manufacture of the identical merchandise set forth in the petition. Thus, identifying the seller for purposes of respondent selection and identifying the domestic producers for

> purposes of industry support are separate questions that require different examinations for different purposes.

*Id.* at 7.

b. *The Court's Remand on the Department's Industry Support Determination*

The Court has now remanded this issue to the Department for further examination and explanation, as appropriate. *USEC Inc. and United States Enrichment Corp. v. United States*, Slip Op. 03-34, (Mar. 25, 2003) (*USEC*). In its remand decision, the Court stated that "Commerce's decision not to apply the tolling regulation to determine who is the producer in connection with its industry support determination is based on the agency's assessment of the purpose and context of the regulation." *USEC*, at 38. The Court acknowledged that "the purpose of the tolling regulation is accurate calculation of export or constructed export price, and that the regulation does not arise in connection with the industry support determination." *Id.* The Court noted, however, that "it is unclear from Commerce's explanation why the definition of 'producer,' a term that is not statutorily defined, should differ between one subsection of the statute and another." *Id.*

In addition, the Court noted the potential incongruity that "Commerce may determine that the utility companies are not producers of LEU for the purpose of the industry support determination, but

subsequently may determine, as a result of applying the tolling regulation, that the same companies are producers for the purpose of determining export price or constructed export price." *Id.* at 39. Citing the principle enumerated in *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (*SKF USA*), the Court stated that "[w]here a term appears in multiple subsections within a statute, we 'presume that Congress intended that the term have the same meaning in each of the pertinent sections or subsections of the statute, and we presume that Congress intended that Commerce, in defining the term, would define it consistently.'" *Id.* at 39, quoting *SKF USA* at 1382. The Court stated that "Commerce is permitted to apply different definitions of such a statutory term only if it provides 'an explanation sufficient to rebut this presumption.'" *Id.*, quoting *SKF USA* at 1382. The Court then stated that:

> as the Court is remanding the Department's determination for reconsideration of its decision not to apply the tolling regulation, Commerce also will have the opportunity to reconsider the effect of the tolling regulation on its industry support determination. If Commerce finds that the tolling regulation applies here, the agency must consider whether those entities determined to be 'producers' under the tolling regulation are also 'producers' for purposes of the industry support determination. Should Commerce determine that this is not the case, and that,

> in effect, a different definition of 'producer' applies in the industry support context than in the context of the export price calculation, the agency is directed to articulate an appropriate basis for such a conclusion.

*Id.* at 40.

c. *Analysis and Discussion of the Industry Support Determination*

In accordance with the Court's direction, the Department has reconsidered its interpretation of its tolling regulation in the industry support context. In this case, we note that in the original LEU investigations the Department uniformly determined uranium enrichers to be the producers of LEU, both for purposes of industry support and for establishing U.S. price and normal value (NV). Because the Court has recognized the potential for reaching incongruous results (*i.e*, finding enrichers to be domestic producers for purposes of industry support, while finding that utility companies may, under the tolling regulation, be considered foreign producers for purposes of establishing U.S. price and NV), the Department will explain its analysis further with respect to the different definitions of the term "producer" used in these contexts. Based upon our examination and interpretation of the statutory provisions governing industry support and U.S. price and NV, together with the relevant legislative history, we find that different legislative purposes behind these statutory provisions warrant the use of different

definitions of the term "producer" in order to fulfill the intent of Congress, as we will explain.

*1. The Statutory Definitions*

In determining whether to initiate AD and CVD investigations, the statute directs the agency to examine whether the petition has been "filed by or on behalf of the industry" under sections 702(c)(4) of the Act for countervailing duties; and section 732(c)(4) of the Act for antidumping duties.[3] Section 771(4)(A) of the Act defines the industry as "the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."[4] Thus, to determine whether there is adequate industry support for a petition, the Department must first identify the domestic like product. Once the product is identified, the agency examines the industry's production for purposes of determining whether the petition is filed by or on behalf of the industry. Specifically, section 732(c)(4) of the Act states that "the administering authority shall determine that the petition has been filed by or on behalf of the industry," if two conditions are established:

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3. 19 U.S.C. §§ 1671 and 1673a(c)(4)(A). For convenience, hereinafter we will refer to the statutory provisions under the antidumping law. Parallel provisions, however, in the countervailing duty law also apply.

4. 19 U.S.C. § 1677(4)(A).

> (i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and
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> (ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by the portion of the industry expressing support for or opposition to the petition.

19 U.S.C. §1673a(c)(4)(A). The statute also defines the term "domestic producers or workers" for purposes of industry support determination, stating that "[f]or purposes of this subsection, the term 'domestic producers or workers' means those interested parties who are eligible to file a petition under subsection (b)(1) of this section."[5] In turn, subsection (b)(1) states that an antidumping proceeding shall be initiated whenever an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 1677(9) of this title files a petition . . ." .[6] The statute enumerates those parties that may file a petition, specifically listing "a manufacturer, producer, or wholesaler in the United States of a domestic like product" under subsection (C), and "a certified union or recognized union or group of workers which is representative of an industry engaged in the

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5. 19 U.S.C. § 1673a(c)(5).

6. 19 U.S.C. § 1673a(b)(1).

manufacture, production, or wholesale in the United States of a domestic like product" under subsection (D).[7]

By contrast, the statutory provisions governing the determination of export price (EP), constructed export price (CEP) and normal value (NV), refer to "the producer or exporter" of the subject merchandise.[8] Section 772(a) of the Act, for example, states that "[t]he term 'export price' means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise . . .". The term "exporter or producer" is expressly defined in the statute as

> the exporter of the subject merchandise, the producer of the subject merchandise, or both where appropriate. For purposes of section 773, the term 'exporter or producer' includes both the exporter of the subject merchandise and the producer of the same subject merchandise to the extent necessary to accurately calculate the total amount incurred and realized for costs, expenses, and profits in connection with production and sale of that merchandise.

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7. Notably, section 771(9)(A) "also confers interested party status upon, *inter alia*, foreign manufacturer, producer, or exporter or the United States importer, of subject merchandise" but does not confer eligibility upon such entities to file antidumping or countervailing duty petitions.

8. *See* Sections 772(a) and (b), and 773(l)(B). 19 U.S.C. § 1677a . . . and § 1677b.

Notwithstanding the fact that the term domestic producers or workers and the term exporter or producer are separately defined in different provisions of the statute, the term "producer" is contained in both the provisions governing industry support and the provisions governing EP, CEP, and NV. The statute, however, does not define the term "producer."

2. *The Federal Circuit Decision in SKF USA*

In *SKF USA*, the Federal Circuit ruled that:

> In the antidumping statute Congress has used the term "foreign like product" in various sections, and has specifically defined it in 19 U.S.C. § 1677(16). We therefore presume that Congress intended that the term have the same meaning in each of the pertinent sections or subsections of the statute, and we presume that Congress intended that Commerce, in defining the term, would define it consistently.

263 F.3d at 1382. The Federal Circuit stated that "[w]ithout an explanation sufficient to rebut this presumption, Commerce cannot give the term 'foreign like product' a different definition (at least in the same proceeding) when making the price determination and in making the constructed value determination. This is particularly so because the two provisions are directed to the same calculation, namely the computation of normal value (or its proxy, constructed value) of the subject merchandise." *Id.* Citing the Supreme Court

decision in *Sorenson v. Treasury*, 475 U.S. 851 (1986), the Federal Circuit in *SKF USA* also noted that this "normal rule of statutory construction" applies with particular force where Congress has specifically defined the term. 263 F.3d at 1381-82.

In this case, however, the term "producer" is not defined in the statute. As we explain further below, to fulfill the legislative purpose of the different provisions at issue, the Department must engage in a different examination, and thereby define the term differently depending upon the context. Unlike the term "foreign like product," which is directed to the same computation of normal value, the term "producer" is being applied in distinct provisions of the statute and for different purposes, requiring different examinations by the agency.

However, even under the circumstances in *SKF USA*, where the term is expressly defined and is directed to the same computation, the Federal Circuit recognized that the agency could rebut the presumption, and interpret the same term differently provided it provides a reasonable explanation. *SKF USA*, 263 F.3d at 1382. Indeed, the Federal Circuit has now ruled on the issue in *SKF USA*, affirming the Department's use of different definitions based upon the agency's further explanation on remand. *FAG Kugelfischer Georg Schafer AG, Et Al, and SKF USA, Et Al v. United States*, 02-1500, 02-1538, 2003 U.S. App. LEXIS 11607 (June 11, 2003).

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3. *Discussion of "Producer" for Purposes of Industry Support*

As discussed above, for purposes of industry support, the statute defines the term "domestic producers or workers" by referring back to "those interested parties who are eligible to file a petition under subsection (b)(1) of this section."[9] Thus, to have standing to file a petition, or to support or oppose a petition, the same "interested party" requirements contained in the statute must be satisfied.

The statute, however, does not define the term "manufacturer" or "producer" of the domestic like product. Where Congress has not defined a term or otherwise indicated what criteria Commerce is to use in determining what constitutes a "producer," the agency has been granted broad discretion to establish its own methodology for determining who qualifies as a producer of the domestic like product. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). In the case of industry support, we believe any definition of such terms as "producer" or "manufacturer" must be informed by the statutory definition of the term "industry" that also appears in the industry support provisions discussed above.

The legislative history pertaining to the definition of the industry is instructive. The Statement of

9. Subsection (b)(1) expressly refers to an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 1677(9).

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Administrative Action accompanying the URAA clarifies that:

> The definition of domestic industry in Article 4 is virtually identical to that in the 1979 Code and current U.S. law. See S. Rep. No. 249, 96th Cong., 1st Sess. 47, 63 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 51, 59-60 (1979).

SAA at 811. In turn, the Senate Report accompanying the 1979 Act that is referred to in the SAA of the URAA above, states:

> The standing requirements in section 702(b)(1) for filing a petition implement the requirements of Article 2(1) of the agreement. *The committee intends that they be administered to provide an opportunity for relief for an adversely affected industry and to prohibit petitions filed by persons with no stake in the result of the investigation.*

S. Rep. No. 249, 96th Cong., 1st Sess. 47 (1979) (emphasis added). For AD, *see id* at 63.

In determining who has standing to file petitions, the court in *Brother Industries (USA) Inc. v. United States* has recognized that "[t]he language in the legislative history is broad and unqualified. It contrasts industries suffering adverse effect with those having no stake: the former have standing; the latter do not." 801 F. Supp. 751, 756 (CIT 1992) (citing S. Rep. No. 249,

96th Cong., 1st Sess. 47 (1979))(*Brother*), *aff'd* 1 F.3d 1253 (Fed. Cir. 1993). In addressing the same statutory term "producer," the court in *Brother* recognized that "ITA has discretion to utilize any methodology reasonably suited to fulfilling the statutory goals." *Id.* at 757.

In exercising its discretion, the Department has adopted the ITC's six-factor test to determine whether a company is a producer of the domestic like product. Like the ITC, the Department's longstanding practice has been to examine the overall nature of a company's manufacturing operations.[10] "At a minimum, a finding that a company is a producer of the domestic like product requires that a company perform some important or substantial manufacturing operation." *LEU Industry Support Mem.*, at 7.

The Department adopted and applied this test to fulfill the statutory goals intended by Congress. Whether a company is at risk from unfairly traded imports depends on the nature and extent of its operations in the United States. It stands to reason that a company may be injured by unfairly traded imports where it is in the business of producing the domestic like product. Thus, the "stake in the result of the investigation" that

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10. *See, e.g., Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured. From Japan: Termination of Circumvention Inquiry ofAntidumping Duty Order*, 59 Fed. Reg. 23693 (May 6, 1994). In that case, Commerce determined that the U.S. company's limited manufacturing operations were not sufficient to confer domestic producer status upon the company.

Congress contemplated would justify the filing of a petition is not the interest of an industrial user in pursuit of lower priced goods. The legislative history makes clear: the law was intended to protect from dumped and subsidized imports those U.S. industries that are at risk of injury due to dumped or subsidized imports.[11] The Department's practice, like that of the ITC, therefore, reasonably recognizes that "whether a company is at risk depends on the nature and extent of its operations in the United States." *Brother*, 801 F. Supp. at 756 (citing the ITC's six-factor test).

Second, the legislative history indicates Congress' intent that the domestic producers in the industry would be engaged in the actual production of the domestic like product. The Senate Report states:

> The term industry is not defined in either the Antidumping Act or in section 303. As noted in the committee report on the Trade Act of 1974 (S. Rept. 93-1298, pp. 179-181), in practice, the phrase "an industry in the United States", as used in both laws, has been interpreted by the ITC as referring to *all the domestic producer facilities engaged in the production of articles like the subsidized or dumped imported articles*, although a number of investigations have been concerned with the

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11. Citing S. Rep. No. 96-249, 96th Cong., 1st Sess. 63 (1979), the court in *Brother* has recognized that "[t]he statute grants petitioner status to an industry that is at risk of injury due to dumped imports." *Brother*, 801 F. Supp. at 756.

> domestic producer facilities engaged in the production of articles, which while not like the imports concerned, are nevertheless competitive with the imports in domestic markets. In either case, *the industry has generally been considered to be a national industry involving all domestic facilities engaged in the production of the domestic articles involved.*

S. Rep. No. 249, 96th Cong., 1st Sess. 82 (1979) (emphasis added).

The Senate Report of the 1979 Act further states that:

> *Section 771(4) enacts in many respects current ITC practice,* and delineates important concepts with respect to the definition and treatment of the term "industry" as that term is used in determining whether an industry in the United States is materially injured, threatened with material injury, or the establishment of an industry is being materially retarded. "Industry" generally means: (1) All the domestic producers who produce products like the imported articles subject to the investigation, or, if no such product exists, the product most similar in characteristics and in use to the imported article subject to the investigation. . . .
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> * * *

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> In examining *the impact of imports on the domestic producers* comprising the domestic industry, *the ITC should examine the relevant economic factors (such as profits, productivity, employment, cash flow, capacity utilization, etc.), as they relate to the production of only the like product*, if available data permits a reasonably separate consideration of the factors with respect to production of only the like product.

S. Rep. No. 249, 96th Cong., 1st Sess. 83-84 (1979) (emphasis added). As is clear from the legislative history, for the ITC to make its determination, it must examine data directly relevant to those companies with domestic facilities actually engaged in the production of the domestic like product, such as profits, productivity, employment, and capacity utilization "as they relate to production of only the like product." While the ITC's test is not binding upon the Department, the connection between the respective determinations cannot be ignored. Companies that have standing to file a petition should reasonably be those same companies at risk from dumped or subsidized imports. Accordingly, both agencies seek to identify domestic producers engaged in the actual production of the domestic like product.[12] Commerce's test fulfills the legislative purpose of the industry support provisions in the statute in that it recognizes that to be at risk from dumped or subsidized

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12. "The definition of domestic industry is important to the Commission's injury analysis and Commerce's initiation determination." SAA at 857.

imports reasonably requires a company, at a minimum, to be engaged in some important or substantial manufacturing operation.

By contrast, if the Department were to interpret its tolling regulation as applicable in the industry support context, and the Department were to apply that regulation in a manner so as to bestow domestic producer status upon industrial users and consumers of the domestic like product, or other entities that have no stake in the result of the investigation (as the term was intended by Congress), the industry at risk from unfairly traded imports would be denied the opportunity to obtain relief, thereby defeating the fundamental purpose of the law.

Other incongruities could also arise from such an application that would frustrate the intent of Congress. For example, by using very different tests, the Department and the ITC could reach significantly different determinations as to the domestic producers in an industry. Because of the significant differences in the tests, each agency could potentially identify different domestic producers, and therefore different industries. In our view, such anomalous results would be inconsistent with the intent of Congress because the adversely affected industry would be denied its opportunity for relief.

Another incongruity would arise in the industry support context with respect to domestic workers if the tolling regulation were to apply. In our view, such an

application would deprive domestic workers of the opportunity to obtain relief under the AD and CVD laws, and thereby defeat a fundamental object of the law.

The statutory provisions governing industry support establish that domestic workers are entitled to file and support petitions for relief from unfairly traded imports, as discussed above.[13] The SAA accompanying the URAA further clarified that the position of workers is equal to that of firms producing the domestic like product for purposes of the Department's industry support determinations. The SAA states:

> New sections 702(c)(4)(A) and 732(c)(4)(A) recognize that industry support for a petition may be expressed by either management or workers. The Administration intends that labor have equal voice with management in supporting or opposing the initiation of an investigation. Commerce's implementing regulations will make clear that in considering the views of labor, *Commerce will count labor support or opposition as being equal to the production of the domestic like product of the firms in which the workers are employed.*

SAA at 862.[14]

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13. "[W]orkers, as well as companies, may file and support petitions." Sen. Rep. 412, 103rd Cong., 2nd Sess., 35 (1994).

14 In implementing its regulation on industry support, Commerce discussed the position of workers in the preamble to its

(Cont'd)

We interpret the statute and the accompanying SAA to indicate that Congress intended the domestic workers to encompass those workers engaged in the actual production of the domestic like product. Moreover, the legislative history indicates that Congress intended that domestic workers, who are eligible to file petitions, to be those workers employed by the firms engaged in such production. Thus, the statute and SAA contemplate that the identification of the domestic producers must involve the identification of firms with workers and facilities that produce the domestic like product.

4. *Review of the Industry Support Determination in the LEU Investigations*

In this case, Commerce examined the production operations that were necessary to manufacture LEU. In determining whether USEC was the domestic producer of LEU, Commerce examined the nature and

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(Cont'd)

proposed regulation, stating that "[c]onsistent with the SAA at 862, an opinion expressed by workers will be considered to be of equal weight to an opinion expressed by management. Thus, for example, if a union expressed support for a petition, the Department would consider that support to be equal to the production of all of the firms that employ workers belonging to the union. On the other hand, if management and workers at a particular firm expressed opposite views with respect to the petition, the production of that firm would be treated as representing neither support for, nor opposition to, the petition." *Antidumping Duties; Countervailing Duties; Proposed Rule*, 61 FR 7307, 7314 (Feb. 27, 1996). *See also* 19 C.F.R. § 351.203(e)(3) (2000).

extent of USEC's manufacturing operations, finding that:

> USEC performs all of the processes necessary for enriching converted uranium. In fact, the Nuclear Regulatory Commission (NRC) requires enrichment facilities to be licensed in order to operate in the United States. The information on the record from the NRC indicates that USEC's two gaseous diffusion plants in Paducah, Kentucky and Portsmith, Ohio are the only facilities in the United States that are licensed to enrich uranium. Accordingly, USEC is the only company in the United States with the technology and the technical expertise necessary to produce LEU. And, all LEU produced in the United States must be enriched by USEC.
>
> Further, the information on the record indicates that enrichment is a major manufacturing process in the production of LEU, responsible for a substantial portion of the total value of LEU; and that enrichment is a necessary process for the production of LEU. Finally, we note that the product output from enrichment facilities is LEU, as defined in the petition.
>
> In light of the fact that USEC is the only entity in the United States that enriches converted uranium to produce LEU; is the only entity

> with the technology and technical expertise to produce LEU; that enrichment is a necessary and major manufacturing process in the production of LEU; and that the product output from USEC's enrichment facilities constitutes the domestic like product, we find that USEC is the only producer of LEU in the United States. Accordingly, we determine that petitioner accounts for 100 percent of LEU production in the United States.

*LEU Industry Support Mem.*, at 4-5.

By contrast, Commerce determined that utility companies were purchasers of LEU rather than producers, finding that:

> the utility companies do not qualify as producers of LEU. These companies do not engage in any type of manufacturing activities related to the production of LEU: they make no claim to have any LEU manufacturing operations; no capital investment in production facilities; they add no value to the product through the performance of any manufacturing operations; and have no employees dedicated to manufacturing. Unlike producers, we find that the utility companies are purchasers and industrial users of LEU.

*Id.* at 8 (citation omitted).

*Appendix G*

Citing the ITC factors used by the Department in *Certain Portable Electric Typewriters from Singapore: Rescission of Initiation of Antidumping Duty Investigation and Dismissal of Petition*, 56 Fed. Reg. 49880 (Oct. 2, 1991), the agency stated, "[t]he utilities make no claim as to any of these factors." *LEU Industry Support Mem.*, at 8, n. 16. Nor is there any evidence on the record to indicate, or support the conclusion, that utility companies have satisfied any of the factors used to determine whether a company is a producer of the domestic like product.

The Department's determination comports with the remedial purpose of the law and the clear intent of Congress. The "stake in the result of the investigation" is not the interest of a consumer or industrial user in pursuit of lower priced goods, as discussed above. Rather, the law was intended to protect from unfair trade those U.S. industries that are at risk due to dumped or subsidized imports. The utility companies are not at risk of injury due to dumped or subsidized imports of LEU. To the contrary, as the Department determined: "[u]nlike producers, we find the utility companies are purchasers and industrial users of LEU." *Id.* at 8. "The principal use of LEU is for the generation of electricity." *USEC Petition*, Prop. Doc. 1, at I-9. It is undisputed that the U.S. utility companies are in the business of producing electricity for sale to consumers in the United States.[15]

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15. LEU is purchased by U.S. utilities for fabrication and manufacture into fuel subassemblies, which are used for nuclear reactors in the production of electricity." *USEC Petition*, Prop. Doc. 1, at I-9, The respondents have conceded this point as well. *See* Plaintiffs' Brief at 24, recognizing that "the utilities consume the nuclear fuel in their reactors."

As such, their business interest, like that of any industrial user, lies in obtaining lower priced LEU in an effort to keep the cost of producing electricity down. Accordingly, unlike domestic producers, they have no stake in the result of these investigations, as envisaged by Congress.

As for the domestic workers, in this case, PACE, the union representing the workers engaged in the actual production of LEU, joined USEC in the AD and CVD petitions. The Department found that the domestic workers provided an independent basis for industry support. *LEU Industry Support Mem.*, at 5. By contrast, the utility companies were found to "have no employees dedicated to manufacturing [of LEU]." *Id.* at 8.

Finally, we find that any application of the tolling regulation for purposes other than the establishment of U.S. price and normal value also presents the potential incongruity of broadly defining the U.S. domestic industry based upon how an entity purchases or obtains the domestic like product, rather than upon its stake in the results of an investigation. For example, if U.S. utilities, by virtue of the tolling regulation, could qualify as domestic producers of LEU based upon how the contractual arrangements are structured, then any entity that obtains LEU from a U.S. enricher, under similar contractual arrangements, could also qualify as a member of the U.S. domestic industry. Accordingly, to the extent that Japanese, French or British utility companies, for example, obtain LEU from USEC under similar arrangements as U.S. utilities, then these foreign

utility companies would also qualify, by virtue of the tolling regulation, as members of the U.S. domestic industry. It is inconceivable how a foreign utility could be adversely affected by unfairly traded LEU in the United States. More importantly, in our view, such a result is not what Congress intended when it enacted the provisions on industry support. Nothing in the statute or the relevant legislative histories supports such a broad application of the AD and CVD laws. In our view, the application of the tolling regulation in this context would frustrate the intent of Congress because it would fail to provide an opportunity for relief for an adversely affected industry, and conversely would fail to prohibit petitions filed by persons with no stake in the result of the investigation, contrary to Congress' intent.

5. *"Producer" for Purposes of Establishing U.S. Price and Normal Value*

Unlike industry support determinations, where the legislative purpose of the provisions is to identify those entities that, by virtue of their facilities and workers dedicated to the production of the domestic like product, have a stake in the results of an investigation, the purpose of the provisions governing U.S. price and normal value is to identify the seller of the subject merchandise and foreign like product, as discussed below.

The term "producer" appears in the statutory provisions governing the establishment of U.S. price and normal value. As noted above, section 772(a) of the Act,

directed at export price, states that export price means "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation *by the producer or exporter of the subject merchandise.*"[16] Similar language on "producer or exporter" is contained in the constructed export price provision.[17] Under these provisions, the Department need not identify and select the foreign "producer" as the respondent in an antidumping investigation. For respondent selection, the statute provides that export or constructed export price may be established by the sale of either "the producer *or* exporter" of the subject merchandise. While the legislative histories of the trade acts provide no guidance as to whether the Department is to establish a preference for exporter over producer, the statutory provisions, including section 773(a)(1)(B) governing the determination of normal value, all focus upon the *price* of the subject merchandise or foreign like product.[18] Accordingly, the Department selects the respondent in an investigation or administrative review based upon which entity sells the subject merchandise and foreign like product.

In promulgating its regulation governing the calculation of U.S. price and normal value, and in particular the subsection addressing "subcontracting" or "tolling," the Department recognized that the focal point of the regulation is the sale of subject merchandise and foreign like product. Specifically, the relevant

16. 19 U.S.C. § 1677a(a) (emphasis added).

17. *See* 19 U.S.C. § 1677a(b).

18. *See* 19 U.S.C. § 1677b(a)(1)(B).

subsection of the regulation states the Department "will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product."[19]

The regulation was promulgated to assist the Department in establishing U.S. price and normal value. Accordingly, for purposes of establishing U.S. price and normal value, the Department does not consider it essential that the entity selected as an appropriate respondent be engaged in any manufacturing operations. Rather, the traditional functions of a producer in this context are not essential to the determination of whether the entity sold the subject merchandise and foreign like product. To clarify further, producers frequently sell the merchandise they produce, and thus they may be identified and selected as the appropriate respondents. The relevant sale of subject merchandise, however, may be made by other companies, such as exporters. In such cases, the Department selects the exporter as the appropriate respondent.[20] This is also the case with resellers in proceedings in which the reseller has sold the subject merchandise. Thus, in this context, the

19. 19 C.F.R. § 351.401(h).

20. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat From Canada*, 68 FR 24707, (May 8, 2003) (selecting the Canadian Wheat Board as the mandatory respondent based upon its status as exporter of the subject merchandise).

performance of traditional producer functions, such as manufacturing operations in which value is added to the product, is not essential to the fulfillment of the object and purpose of the regulation, which is to establish U.S. price and normal value. Accordingly, the Department will select the exporter or reseller of subject merchandise over the producer, not based upon the producer's performance of any producer-type functions, but based upon the Department's determination of which entity sells the subject merchandise to or into the United States.[21]

In promulgating its tolling regulation, the Department indicated the relevance of the traditional manufacturing operations when it stated that "[t]he Department will not consider the subcontractor to be the manufacturer or producer regardless of the proportion of production attributable to the subcontracted operation or the location of the subcontractor or owner of the goods." *Antidumping Duties: Countervailing Duties: Proposed Rule*, 61 FR 7307,7330 (Feb. 27, 1996). In such cases, the Department looks to the seller of the subject merchandise as the

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21. *See, e.g.*, section 773(a)(1)(B) of the Act establishing normal value as "the price" at which the foreign like product is first sold. *See also* section 773(a)(3)(A), where producer knowledge "*at the time of the sale* that the merchandise was destined for exportation" is a factor in determining whether the producer's sale in the home market will be used to establish normal value. *See also Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Taiwan*, 64 FR 15493, 15498 (Mar. 31, 1999).

respondent, regardless of whether the seller has manufacturing operations. This definition of producer fulfills the purpose of the statute in that it enables the agency to establish as accurately as possible U.S. price and normal value for purposes of determining the margin of dumping.

**Industry Support Conclusion**

Based upon the above, the Department may interpret the term producer in the U.S. price and normal value contexts differently than in the industry support context, depending on the circumstances of the case, in order to fulfill the legislative purposes behind these provisions, as envisaged by Congress. With respect to the Department's tolling regulation, the Department has never applied its regulation on tolling for purposes of industry support because to do so would frustrate the intent of Congress to properly identify those domestic producers engaged in the production of the domestic like product, and thus it would fail to provide U.S. domestic industries with the opportunity to obtain relief as intended by Congress.

**Comments from Parties**

USEC[22] and the workers' union, PACE,[23] filed comments supporting the Department's analysis and

22. USEC Inc., and United States Enrichment Corporation (collectively USEC).

23. The Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO and Local 5-689 (PACE).

conclusion on industry support. These parties have also made suggestions to the Department for clarification purposes. We have made changes to the remand determination as appropriate for clarification purposes.

The Ad Hoc Utilities Group (AHUG) submitted comments on industry support. Urenco and Eurodif have not submitted comments on this issue, but have instead indicated their support and agreement with AHUG's comments. *Urenco/Eurodif Comments*, June 13, 2003, at 3, n. 2.

**ABUG's Comments on Industry Support**

AHUG advances several points to support its contention that the justifications provided by the Department's industry support determination do not satisfy the standard for giving the same term in the statute different meanings. AHUG's Comments, at 3. AHUG first contends that the Department's draft remand ignores the plain language of the statute, and relies instead upon legislative history that does not pertain to the applicable section of the statute. *Id.* at 4-5. AHUG further contends that the Department lacks authority to require manufacturing operations in order to determine whether entities are producers for purposes of industry support. *Id.* at 7. AHUG further asserts that the Department's practice does not require manufacturing operations for purposes of industry support. *Id.* at 7-8.

Next, AHUG argues that the Department's interpretation of the term "producer" in the industry support context contradicts the plain language of the statute and the Department's own regulation on tolling. *Id.* at 6. Instead, AHUG argues, the statute provides mechanisms for preventing domestic producers benefitting from unfairly traded imports from blocking initiation of investigations, while recognizing that such producers are still part of the domestic industry. *Id.* at 9. Finally, AHUG contends that it remains unclear whether USEC has a cognizable stake in the domestic industry.

**Department Position:**

At the outset, we note that, fundamentally, AHUG is arguing that the Department, as a matter of law, is prohibited from applying the ITC's 6-factor test to determine whether an entity is a "producer" for purposes of industry support. This same test has been expressly approved by Congress in the relevant legislative history, and was held to be a reasonable interpretation of the statute by the Court of International Trade in *Brother.* Accordingly, we have continued to apply the test in this case. Each of AHUG's points is discussed further below.

With respect to the relevance of the statutory definition of the term "industry" and its legislative history, AHUG contends that the Department is attempting "to avoid the plain language of the statute by asserting that the legislative history related to the definition of industry in Section 771(4) evidences

congressional intent to limit the domestic industry for industry support purposes to those entities with manufacturing facilities." *Id.* at 5. AHUG argues that, to the contrary, the legislative history confirms that Section 771(4) was intended to reflect and apply to the practice of the ITC in determining whether an industry is materially injured. AHUG claims that the statute plainly distinguishes between the analysis required for the ITC to identify the relevant industry to determine injury, on the one hand, and the domestic interested parties pertinent to the Department's industry support determination, on the other. According to AHUG, the Department cannot refer to legislative history of another, distinct provision to interpret already clear statutory language." *Id.* at 5.

We disagree with AHUG. Rather, we find that Congress intended the term "industry," as defined in section 771(4)(A) of the Act, to be relevant and applicable to the Department's analysis for purposes of industry support. First, as discussed in the body of the Department's remand determination above, to determine whether to initiate AD and CVD investigations, the statute directs the agency to examine whether the petition has been "filed by or on behalf of the industry" under sections 702(c)(4) of the Act for countervailing duties and section 732(c)(4) of the Act for antidumping duties. The legislative history that we relied upon, moreover, expressly refers to the standing requirements for filing a petition. The legislative history addressing the term "industry" states:

> *The standing requirements in section 702(b)(1) for filing a petition implement the*

> *requirements of Article 2(1) of the agreement.* The committee intends that they be administered to provide an opportunity for relief for an adversely affected industry and *to prohibit petitions filed by persons with no stake in the result of the investigation.*

S. Rep. No. 249, 96th Cong., 1st Sess. 47 (1979) (emphasis added). For AD, *see id* at 63. As discussed above, the court in *Brother* recognized the relevance of, and specifically relied upon, the same legislative history of the 1979 Act in affirming the Department's use of the 6-factor test to determine whether the entity at issue in that case was a producer of the domestic like product.[24] Finally, the SAA accompanying the URAA clarifies that:

> The definition of domestic industry is important to the Commission's injury analysis *and Commerce's initiation determination.* With the exception of conforming changes in terminology and . . . , section 222(a) of the bill does not change the basic definition of domestic industry in section 771(4)(A).

SAA at 857 (emphasis added). Accordingly, we do not accept AHUG's conclusion that the definition of the term

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24. AHUG dismisses the relevance of the court's decision in *Brother* because that decision pre-dated the adoption of the Department's tolling regulation. AHUG, however, does not address the court's reliance upon the legislative history pertaining to the term "industry" in that case and its relevance to the Department's determinations.

"industry" defined in section 771(4), and its legislative history, is not relevant to the Department's determinations on industry support.

Next, AHUG contends that the Department's application of the tolling regulation as limited to the context of defining the "producer or exporter" for EP or CEP is contradicted by the plain language of the statute and the Department's regulation on tolling. AHUG contends that "the tolling regulation, by its terms, applies to the identification of a 'manufacturer or producer.'" *AHUG's Comments*, at 6. AHUG argues that if the tolling regulation were focused solely on identifying the party responsible for the export price, it would not have substituted the term "manufacturer or producer" for the statute's use of the term "producer or exporter." AHUG concludes that the only reasonable interpretation of this difference in terminology is that the tolling regulation applies to toll manufacturing generally. Because established rules of statutory and regulatory construction require that regulations must be read to give effect to every word, AHUG asserts, the Department's interpretation of its tolling regulation is impermissible because it would replace the term "manufacturer" with the term "exporter." *Id.*

We disagree. First, by its own terms, the regulation states that the provision applies for purposes of establishing EP, CEP and NV, as discussed above. Thus, the plain language of the regulation supports the Department's interpretation that it is not applicable for purposes of industry support. Second, as discussed

above, the application of the regulation for purposes of determining industry support would be contrary to the intent of Congress established in the legislative history.

AHUG next contends that the Department's practice does not require manufacturing operations for purposes of determining industry support. *Id.* at 7. AHUG argues that the Department incorrectly relies upon *Industrial Belts and Components and Parts Thereof Whether Cured or Uncured. From Japan: Termination of Circumvention Inquiry of Antidumping Duty Order*, 59 FR 23693, 23694 (May 6, 1994) (*Industrial Belts From Japan*). According to AHUG, the salient issue in that case was not whether the company, Brecoflex, had manufacturing facilities, which it did, but rather whether the activities performed in the United States altered the essential nature of the imported merchandise such that it could be considered domestic like product. Based upon that inquiry, AHUG argues, that case has no bearing whatsoever on whether or not a tollee is required to have manufacturing operations to be counted as part of the domestic industry in an industry support analysis. *AHUG's Comments*, at 7-8.

We disagree. The Department has stated that to be a domestic producer, an entity, at a minimum, must engage in some important or substantial manufacturing operation. While it was established in *Industrial Belts From Japan* that Brecoflex engaged in some processing operations, *i.e.*, finishing and packaging, the Department found that the operations were not sufficient or adequate for the company to be considered a domestic producer.

Thus, the test applied in that case was not limited to whether Brecoflex had manufacturing facilities. To the contrary, the test allowed the agency to determine the nature and extent of Brecoflex's operations in determining whether the entity should qualify as a domestic producer. Thus, AHUG is correct in that having *some* manufacturing or finishing operation alone may not be sufficient to establish the entity as a producer of the domestic like product. This is a minimum requirement. In our view, *Industrial Belts From Japan* stands for the principle that, at a minimum, an entity must establish that it performs an important or substantial manufacturing operation to be considered a producer of the domestic like product. Accordingly, the decision in *Industrial Belts From Japan* is consistent with the decision in the instant case to consider the nature and extent of the manufacturing operations in determining whether the entity qualifies as a producer of the domestic like product.

Next, AHUG cites two cases, *Ferrovanadium From China and South Africa*[25] and *Live Cattle From Canada*,[26] to support its proposition that the Department's recent cases indicate that an entity need not have like-product manufacturing operations to be considered part of the domestic industry, and that the

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25. *Initiation of Antidumping Duty Investigations: Ferrovanadium From China and South Africa*, 66 FR 66398 (Dec. 26, 2001) (*Ferrovanadium*).

26. *Initiation of Antidumping Duty Investigations: Live Cattle from Canada and Mexico*, 63 FR 71886 (Dec. 30, 1998) (*Live Cattle*).

Department need not align its domestic industry determination with that of the ITC. *Id.* at 8-9. Specifically, AHUG contends that in *Ferrovanadium* three of the five petitioners were tollees with no like-product manufacturing of their own. In *Live Cattle*, AHUG contends, the Department included wholesalers of the domestic like product within the industry for purposes of industry support.

We disagree with AHUG's points. With respect to *Live Cattle*, the case involved wholesalers of the domestic lie product who qualified as interested parties, respectively, under subsection 771(9)(C), and associations thereof under subsection 771(9)(E) of the Act. *Live Cattle Industry Support Memorandum*, at 17. In the case of LEU, no party claims, nor does the evidence on record support a conclusion, that the U.S. utility companies are wholesalers of LEU. The Department's 6-factor test is to determine whether a company qualifies as a domestic producer, not a wholesaler, of the domestic like product.

With respect to tollees, in *Ferrovanadium*, a case initiated after the initiations of the LEU investigations, the Department made no affirmative finding that tollees are to be considered producers of the domestic like product. The notice of initiation indicates that the Department "received no opposition to the petitions." *Id.* at 66399. The Department found that two companies in that case, "BMC and Shieldalloy together account for 100 percent of U.S. product of ferrovanadium." Therefore, the Department had no need to address the

status of tollees in that case. There is no discussion of the tolling regulation and its application; and no industry support memorandum was prepared given the above facts as to BMC and Shieldalloy. The issue of which companies qualify as domestic producers and upon what basis was not an issue for purposes of initiation and was not addressed in a meaningful way in the initiation notice. Consequently, we believe that the status of the other companies in that case was not sufficiently highlighted and therefore the case should not be considered to represent a change in practice for the agency.

Instead, the Department's practice in this area is more clearly reflected in the recent case of *Certain Color Television Receivers from Malaysia and the People's Republic of China.*[27] In that case, the Department examined the operations of a toller to determine whether the entity was a producer of the domestic like product for purposes of industry support. The petitioning company submitted information on the 6-factors. The Department concluded that the company was a domestic producer because, *inter alia*, it added significant value in its CTV production and had substantial capital investment in its CTV production facility. *See CTV Industry Support Memorandum*, at 5. That decision went on to state that the Department's tolling regulation was not applicable for purposes of industry support determinations, based upon the language and purpose of the regulation to establish U.S. price and normal value.

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27. *Notice of Initiation of Antidumping Duty Investigations: Certain Color Television Receivers from Malaysia and the People's Republic of China*, 68 FR 32013 (May 29, 2003).

*Id.* In sum, the Department continues to maintain in practice the position that to be a domestic producer, a company must, at a minimum, engage in some important or substantial manufacturing operation, and that the 6-factor test continues to be an important part of the agency's practice with respect to determining whether an entity is a producer for purposes of industry support.

In its next point, AHUG contends that the Department's alleged requirement that producers have manufacturing facilities in order to prevent parties benefitting from unfairly traded imports from blocking initiation of investigation is unfounded. According to AHUG, Congress expressly provided a mechanism for discounting the opinion of members of the domestic industry when they are related to foreign producers or are importers of subject merchandise. AHUG argues that because Congress has already determined the precise circumstances under which a party's opinion may be disregarded on the basis that it benefits from dumped or unfairly subsidized imports, the Department cannot go beyond the existing statutory scheme to disqualify parties that are neither related to foreign manufacturers nor importers.

We disagree with AHUG on this point. First, the issue of whether an entity qualifies as a member of the domestic industry revolves around whether the entity has a stake in the results of an investigation, as discussed above, *i.e.*, whether the entity can be at risk from unfairly traded imports. AHUG's arguments as to other provisions of the statute, such as those governing the

treatment of domestic producers who are related to foreign producers, and who are importers of subject merchandise, do not shed light on how the Department is to interpret the term "producer" for purposes of industry support in the first instance. We note, moreover, that AHUG has not attempted to explain how the utility companies, under any scenario, would be at risk from unfairly traded imports of LEU. Apart from legal arguments concerning the interpretation of the language of the statute and tolling regulation, and the relevant legislative histories, AHUG makes no argument as to why Congress would have intended to extend the relief available under the AD and CVD laws to cover entities which are not at risk from unfairly traded imports.

As a final matter, AHUG argues that it remains unclear whether USEC has a cognizable stake in the domestic industry. *AHUG Comments*, at 10. AHUG states that it is a matter of public record that USEC imported 5.5 million SWUs from Russia in 2000. AHUG points out that USEC exports the great majority, if not all, of the LEU produced at the U.S. facilities, while it delivers Russian origin material to U.S. utility companies. AHUG complains that the Department has not dealt with the legal implications of allowing a company to use the trade remedy law to protect sales in the United States of its imports from a third country, rather than domestic production." *Id.*

We note first that AHUG does not set out a legal basis for the Department to undertake the analysis it suggests, nor any statutory provisions that would

support such an examination. We note, for example, that the statute contains no public interest provision. Instead, the statute states that an antidumping proceeding "shall be initiated whenever an interested party" alleges the necessary elements under section 731 of the Act. The statute does not require, nor provide a basis for, the Department to determine whether to initiate an investigation based upon how a producer disposes of its domestic production, whether it sells it abroad or in the United States. The relevant issues for determining industry support in the 20-day period following the filing of a petition involves, *inter alia*, resolution of whether the entity is a producer of the domestic like product, and whether there is sufficient industry support for the petition for purposes of initiation. To the extent a domestic industry is materially injured by unfairly traded imports from the countries identified in the petitions, the law provides a remedy to the domestic industry, regardless of which markets domestic producers choose to serve by virtue of their sales of the domestic product.

Second, we note that if the facts are as AHUG suggests, i.e., that USEC sells its domestic production abroad, but sells its Russian SWUs to U.S. utility companies, then the potential incongruity of applying the tolling regulation in the industry support context, as discussed in the body of this remand determination, would be present in this case. As noted above, if U.S. utilities, by virtue of the tolling regulation, could qualify as domestic producers of LEU based upon how the contractual arrangements are structured, then any

entity that obtains LEU from a U.S. enricher, under similar contractual arrangements, could also qualify as a member of the U.S. domestic industry. We noted, therefore, that to the extent Japanese, French or British utility companies, for example, obtain LEU from USEC under similar arrangements as U.S. utilities, then these foreign utility companies would also qualify, by virtue of the tolling regulation, as members of the U.S. domestic industry. Under the facts presented by AHUG, however, USEC sells its domestic production abroad, but sells its Russian LEU, downblended from HEU, to the U.S. utilities. Thus, apart from the incongruity of applying the tolling regulation in this context, such an application in this case would not establish the U.S. utilities as domestic producers of LEU. We believe, therefore, that the facts in this case further demonstrate the potential incongruity of applying the tolling regulation in the industry support context, consistent with the reasons stated above.

## B. THE AGENCY'S TOLLING REGULATION

### a. *The Department's Analysis Under the "Tolling Regulation"*

In making its final affirmative determination, the Department examined and addressed, *inter alia*, the distinct issues of whether the AD and CVD law applies to LEU entering the United States pursuant to enrichment contracts; and separately, whether foreign enrichment companies are the appropriate respondents in the AD investigations, based upon the Department's tolling regulation and application to the facts in this case.

*Appendix G*

(i) *Scope of the AD and CVD Law*

Separate from our analysis and conclusions in the final determinations with respect to the Department's tolling regulation, we determined that "all LEU from the investigated countries entering the United States for consumption is subject to the AD and CVD laws." *Final French AD Determination*, 66 FR at 65878. In making that determination, we stated that "the AD and CVD laws were enacted to address trade in goods." We further stated that "the issue of whether merchandise entering the United States is subject to the AD and CVD laws depends upon whether the merchandise produced in, and exported from, a foreign country is introduced into the commerce of the United States." *Id.* We also found that:

> In these investigations, no party disputes that the LEU entering the United States constitutes merchandise. As the product yield of a manufacturing operation, the Department continues to find that LEU is a tangible product. Second, it is well established, and no party disputes, that the enrichment process is a major manufacturing operation for the production of LEU, and that enrichment is a required operation in order to produce LEU. Thus, we find that the enrichment process constitutes substantial transformation of the uranium feedstock. We continue to find, therefore, that the LEU enriched in and exported from Germany, the Netherlands, the

United Kingdom and France is a product of those respective countries.

66 FR at 65879.

We also stated that "the LEU at issue (i.e., under SWU or enrichment transactions) enters the commerce of the United States. Thus, the question of whether enrichers sell enrichment processing, as compared to LEU, is not relevant to the issue of whether the AD and CVD law is applicable. Rather, it is only relevant in these investigations for purposes of determining how to calculate the dumping margin and how to determine who is the producer/seller of subject merchandise." *Id.*

With respect to arguments raised that enrichment is a service beyond the scope of the AD and CVD law, we noted, *inter alia*, that "reference to the term 'services' mischaracterizes the nature of enrichment operations, and attempts to place a major manufacturing operation which produces merchandise squarely outside the realm of trade in goods, based solely upon the way in which particular sales of such merchandise are structured." *Id.*

Some parties argued that the AD and CVD laws are inapplicable because the utility companies cannot be considered the sellers of subject merchandise since they do not sell LEU, but instead sell electricity to U.S. consumers. These parties concluded that the law is not applicable because no entity sells the subject merchandise. In that context, we stated that "[i]t does not matter whether the producer/exporter sold subject

merchandise as subject merchandise, or whether the producer/exporter sold some input or manufacturing process that produced subject merchandise, as long as the result of the producer/exporter's activities is subject merchandise entering the commerce of the United States." *Id.*

The Department also addressed respondents' and AHUG's arguments that the tolling regulation provides a basis for obtaining an exemption under the law for the LEU at issue, stating that "we do not interpret section 351.401(h) of the Department's regulations to be relevant or applicable in determining whether merchandise entering the United States is subject to the AD and/or CVD laws." *Id.* 66 FR at 65880. The Department stated:

> Instead, section 351.401, including subsection (h) on tolling, was intended to "establish certain general rules that apply to the calculation of export price, constructed export price and normal value," and not for the purpose of determining whether the AD and/or CVD laws are applicable. Our interpretation that the tolling regulation is intended solely for purposes of calculating dumping margins is further supported by the absence of any parallel provision on tolling in the CVD regulations.
>
> Furthermore, in practice, we have never applied, nor relied upon, section 351.401(h) to exempt merchandise from AD proceedings,

> nor have we ever applied the provision in CVD proceedings. Moreover, our application of the tolling regulation in SRAMs from Taiwan does not support AHUG's or respondent's claim for exemption from the AD and CVD laws. In that case we applied the tolling regulation, seeking to determine which party made the relevant sale of subject merchandise.

*Id.* 66 FR at 65880 (citations omitted).

(ii) *Determination of the Producers of Subject Merchandise*

The Department determined that the foreign enrichers are the producers of the subject merchandise for purposes of establishing U.S. price and normal value for several reasons. First, the Department found that "the enrichment process is such a significant operation that it establishes the fundamental character of the LEU." *Id.* 66 FR at 65884. "Second, the enrichers control the production process to such an extent that they cannot be considered tollers in the traditional sense under the regulation. Third, utility companies do not maintain production facilities for the purpose of manufacturing subject merchandise." *Id.* Finally, the Department reasoned that "the overall arrangement, even under the SWU contracts, is an arrangement for the purchase and sale of LEU." *Id.*

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b. *The Court's Remand on the Department's Tolling Regulation*

The Court has now remanded this issue to the Department for further reconsideration of its decision not to apply the tolling regulation in this case. *USEC*, Slip Op. 03-34, (Mar. 25, 2003). In reviewing the case, the Court stated that the circumstances in this case largely resemble the tolling arrangements seen in earlier determinations by the Department. The Court noted that, like the producer, Akai, in *Certain Forged Stainless Steel Flanges from India*, the utilities in this case direct and control the process of producing the merchandise, i.e., nuclear fuel. Using contractors at each step, the Court noted, they coordinate the production of uranium, LEU, and fuel rods. As in *Polyvinyl Alcohol from Taiwan*, where the contracting company provided the material to be processed, the utilities in this case provide the feed uranium to the enrichers and pay separately for the work performed, measured in SWUs. The utilities, by supplying the feed uranium, accept the risk of fluctuations in the price of UF6 and can make the decision as to how much UF6 versus how many SWUs to purchase in a given transaction. *USEC*, at 22-23.

The Court examined the contracts, finding that SWU contracts require the utility customer to provide the quantity of feed necessary to produce the desired quantity and assays of LEU. The Court also found that the utility customer retains title to the feed uranium until it is enriched. Upon enrichment and delivery of the LEU, the title to the feed is considered extinguished and the

customer gains title to the LEU. *Id.* at 23. The Court also found it significant that the contracts for LEU state that once the separative work is performed and the LEU is delivered, the feed material shall be deemed to have been enriched; whereupon the customer takes title to the LEU associated with such feed material and title to the feed material will be extinguished. *Id.* The Court found that "[t]hese contractual provisions acknowledge the fungible nature of feed uranium while establishing a legal fiction that the enrichment process will be performed on the uranium provided by the customer." *Id.* at 24. Based upon its examination of the contracts, the Court found that the SWU contracts indicate that the provision of feed uranium is not treated by the parties as a payment in kind, but the provision of specific material, owned by the customer, to be enriched. The Court concluded that "the contractual provisions, without more, do not support Commerce's interpretation that the provision of feed uranium is substantively a payment in kind." *Id.*

Moreover, the Court found that the designation by the utilities of particular assays for the LEU and for uranium tails is analogous to DuPont's provision of specifications to Chang Chun in *Polyvinyl Alcohol from Taiwan*, and to Akai's control of the specifications in *Certain Forged Stainless Steel Flames from India*, where the Department found these companies to be producers of the subject merchandise. In the case of LEU, the Court found that the designation of quantities and assays is based on (1) the design of the core reactor, which determines the level of U235 needed by that

reactor, and (2) the utility's needs at a particular time, depending on its operating cycle and the amount of fuel that has been spent. *Id.* at 24-25. The Court stated that the utilities provide these specifications to the enricher, which then produces LEU in the required quantities and assays. *Id.* at 25.

Citing *SRAMs from Taiwan* and *Certain Forged Stainless Steel Flanges from India*, the Court stated that "Commerce has previously indicated that control over the specifications of the final product was sufficient control to be considered a producer. Companies that did not engage in actual manufacturing processes have previously been held to be producers of subject merchandise." *Id.* The Court concluded that "if the text of 19 C.F.R. § 351.401(h) and Commerce's prior decision were applied to the evidence on this record, the SWU contracts would be treated as contracts for the performance of services, and the enrichers would be treated as tollers and the utilities as the producers of LEU." *Id.* at 26-27.

The Court then examined the Department's grounds for treating the enrichers as producers. Finding unpersuasive the Department's basis that the enricher's operations establish the fundamental character of LEU, the Court reasoned that in prior tolling cases, it has been the toller that created the "essential character" of the finished good by transforming the raw materials or inputs into subject merchandise. In the case of LEU, the Court noted, the enricher transforms feed uranium into LEU. "Yet, as in earlier cases, while the enricher's

operations create the 'essential character' of LEU, the enricher does not acquire ownership over either the feed or the final product, and neither its operations nor its pricing account for the full value of the finished LEU." *Id.* at 27-28. Second, the Court found unpersuasive the Department's conclusion that enrichers control the production of LEU under SWU contracts because, like Akai in *Certain Forged Stainless Steel Flanges from India*, the utilities control the specifications of the final product, even though, as in past determinations by the Department, "the actual processes of creating the product are left within the control of the tollers." *Id.* at 28-29. Third, the Court found unpersuasive the Department's reasoning that the utility companies have no production facilities for the purpose of manufacturing subject merchandise. Citing *SRAMs from Taiwan*, *Certain Pasta from Italy*, and *Certain Forged Stainless Steel Flanges from India*, once again, the Court noted that in prior determinations the Department found entities to be producers who did not maintain manufacturing facilities, but that this did not prohibit the application of the tolling regulation. *Id.* at 29. Finally, the Court found unpersuasive the Department's basis that "the overall arrangement, even under the SWU contracts, is an arrangement for the purchase and sale of LEU." The Court noted that under any tolling arrangement, the "overall arrangement" is one for acquisition of a good, usually manufactured by the toller. Again, the Court reasoned that the agency previously distinguished toll-produced goods on the grounds that the toller does not acquire ownership, and the toller's price for its work does not represent the full value of the good. *Id.* at 30.

The Court, therefore, concluded that it could not "reconcile the Department's prior distinctions between tolling services and sale of goods with the agency's statements in this case that EUP and SWU contracts are 'functionally equivalent' and '[i]t does not matter whether the producer/exporter sold subject merchandise as subject merchandise, or whether the producer/exporter sold some input or manufacturing process that produced the subject merchandise, as long as the result of the producer/exporter's activities is subject merchandise entering the commerce of the United States.'" *Id.* at 30-31. The Court stated that "Commerce's claim that the sole difference between enrichment transactions and sales of LEU under EUP contracts is the way such transactions are structured fails to take into account a critical difference between the two transactions: what is purchased." *Id.* at 31.

The Court found that the SWU transactions do not contemplate the sale of the completed product, and do not include the significant cost of the natural uranium, which is approximately 35 percent of enriched uranium's total value. *Id.* at 32. The Court pointed out that the Department previously recognized "where the price paid for the subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping law." *Id.* at 32-33.

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In remanding the case, the Court acknowledged that "[w]hile Commerce correctly states that 19 C.F.R. § 351.401(h) does not 'exempt merchandise from (antidumping) proceedings,' the regulation is applicable in determining who is the producer in order to determine export price or constructed export price. Thus, a determination that the enricher provides a tolling service would mean that the price charged by the enricher to the utility for the enrichment cannot form the basis of the export price for the purpose of determining dumping margins." *Id.* at 33 (citations omitted). The Court noted that the Department is authorized to depart from its prior practice as long as the agency articulates a "reasoned analysis" which demonstrates that the departure is supported by substantial evidence and in accordance with law. The Court found that "Commerce's decision not to apply the tolling regulation to a case that appears similar to earlier tolling cases . . . represents a departure from the practice authorized by a regulation 'having the force and effect of law.' As such, Commerce's decision requires a more persuasive explanation than provided in the agency's determinations." *Id.* at 34 (citations omitted).

Because the Department's reasons for distinguishing the instant case, and consequently for declining to apply the tolling regulation, were found to be unpersuasive, the Court concluded that the Department's decision "to treat these contracts as contracts for sales of a good is neither supported by substantial evidence nor in accordance with law." *Id.* at 34-35. Accordingly, the Court remanded this case for the Department to reconsider

its decision not to apply the tolling regulation. *Id.* at 34-35, and 40.

a. *Analysis and Discussion of the Department's Tolling Regulation*

In accordance with the Court's direction, the Department has reconsidered the application of its tolling regulation in these investigations. Pursuant to that reconsideration, the Department has determined that the enrichment companies are the producers of LEU, and thus are the appropriate respondents for purposes of establishing the U.S. price of the subject merchandise and its normal value. An examination of the facts of this and prior determinations on tolling arrangements is discussed below.

(i) *The Tolling Regulation*

The Department's regulation addressing the "calculation of export price, constructed export price, fair value, and normal value" states that "[i]n general terms, an antidumping analysis involves a comparison of export or constructed export price in the United States with the normal value in the foreign market. This section establishes certain general rules that apply to the calculation of export price, constructed export price, and normal value." 19 C.F.R. § 351.401(a). One of the general rules promulgated by the Department speaks to the treatment of subcontractor or tolling situations. That provision states that the Department "will not consider a toller or subcontractor to be a manufacturer or

producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product." 19 CFR § 351.401(h).

As a general rule, the language of the tolling subsection was intended to "establish[] certain conditions under which the Department will not find a toller or subcontractor is the producer of the subject merchandise." *Final Results of Antidumping Duty Administrative Review: Polyvinyl Alcohol From Taiwan*, 63 FR 32810, 32813 (June 16, 1998) (*Polyvinyl Alcohol from Taiwan*). In administering the regulation, the Department has consistently stated that "[t]he purpose of the tolling regulation is to identify the seller of the subject merchandise for purposes of establishing export price, constructed export price, and normal value." *LEU from France*, 66 FR at 65878; *Taiwan Semiconductor Manufacturing Co. Ltd. v. United States, Remand Determination*, (May 2, 2000), at 4 (*SRAMs from Taiwan*).[28] In practice, the Department has also recognized that "the regulation does not purport to address all aspects of an analysis of tolling arrangements." *Polyvinyl Alcohol from Taiwan*, 63 FR at 32813. More specifically, the Department has recognized that it is "not restricted to the four corners of the contract" and will "look at the totality of the circumstances presented" in order to determine the appropriate respondent in a given case. *Id.*

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28. The text of this determination can be found on the Department's Internet site at http://ia.ita.doc.gov/remands/00-48.htm.

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The Court has cited several administrative determinations in which the facts appear to be similar to the facts of the instant case.[29] The Department has closely examined the facts and determinations made in those cases, and the facts in the instant case. Based upon our analysis and the express purpose of the tolling regulation, we have concluded that the tolling regulation cannot be applied to the facts and circumstances of this case without defeating the purpose of the regulation and the statutory provisions that the regulation is designed to implement, as discussed below.

A fundamental requirement upon which the tolling regulation is premised is that merchandise produced through a tolling operation is sold to a party in the United States. As discussed above, the tolling regulation focuses upon the sale of subject merchandise. It states, in part, that the Department will not consider the toller to be the manufacturer or producer where the toller "does not control the relevant sale" of the subject merchandise or foreign like product. In promulgating the tolling regulation, the Department did not contemplate the situation in which the tollee makes no sales of subject

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29. *Polyvinyl Alcohol from Taiwan: Final Results of Antidumping Duty Administrative Review*, 63 FR 32810, 32813 (June 16, 1998) (*Polyvinyl Alcohol from Taiwan*); *Taiwan Semiconductors Mfg Co. v. United States*, 143 F. Supp. 2d 958, 966 (2001); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Forged Stainless Steel Flanges from India*, 58 FR 68853 (Dec. 29, 1993) (*Flanges from India*); *Certain Pasta from Italy: Preliminary Results of New Shipper Antidumping Duty Administrative Review*, 63 FR 53641, 53642 (Oct. 6, 1998) (*Pasta from Italy*).

merchandise. In the preamble to its proposed regulation, the Department stated "where a party owning the components of subject merchandise has a subcontractor manufacture or assemble that merchandise for a fee, the Department will consider the owner to be the manufacturer, because that party has control over how the merchandise is produced and *the manner in which it is ultimately sold.*" *Antidumping Duties: Countervailing Duties: Proposed Rule*, 61 FR 7307, 7330 (Feb. 27, 1996) (emphasis added) (*Proposed Rule*). The Department illustrated how it anticipated the regulation would work, stating as follows:

> For example, where Firm A sends raw materials to a subcontractor for finishing before Firm A sells the finished goods to the United States, the Department will base export price or constructed export price on the price charged by Firm A (or its U.S. affiliate) for the finished goods. Similarly, the Department will base normal value on Firm A's sales of the finished goods in its home market . . .

*Proposed Rule*, 61 FR at 7330.

In promulgating the tolling regulation, the Department only anticipated the situation in which both the toller and the tollee would make sales that could be construed as sales of subject merchandise. In the above illustration, the Department anticipated that Firm A, the tollee, would be selected as the respondent because the

price Firm A charges is for the finished goods (*i.e.*, the subject merchandise). In its practice under the regulation, the Department has consistently faced a choice of respondents, based upon its analysis of the sales made by two entities – the toller on the one hand, and the tollee on the other, for all prior cases addressing tolling arrangements, including those referenced by the Court. In each of these cases, the tollee made sales of subject merchandise.

In *SRAMs from Taiwan*, for example, the Department was faced with a choice between sales made by TSMC, a foundry and a seller of wafer processing for a fee; and sales made by the U.S. design house, a seller of SRAMs to unaffiliated customers in the United States. *SRAMs Remand Determination*, at 5. In making its determination, the Department analyzed not only the foundry's sales of wafer processing, but also the sales made by the tollee, the U.S. design house, stating "we found that it was appropriate to treat the design house as the manufacturer, rather than TSMC in accordance with 19 CFR 351.401(h), because we concluded that the relevant sale was the sale between the design house and its customers." *SRAMs Remand Determination*, at 3 (citing *SRAMs Final Determination*), and 5.[30] *See also*

30. In the *SRAMs Remand Determination*, the Department also noted that "*[w]e normally consider the producer to be the party that sets the price* to the United States except in cases where the producer does not know that the subject merchandise is ultimately destined for the United States. In those cases, we find that a subsequent reseller controls the relevant sale, rather than the producer." *SRAM Remand Determination*, at n.4 (citation omitted) (emphasis added).

*Flanges from India*, 58 FR at 68856 (where Akai, the respondent selected by the Department, sold the flanges in question in the United States); *Pasta from Italy*, 63 FR at 53642 (where the respondent, Corex, was "solely responsible for the marketing and sales of the product"); *Final Determination of Sales at Less Than Fair Value: Chrome-Plated Lug Nuts From Taiwan*, 56 FR 36130, 36131 (July 31, 1991) (*Lug Nuts From Taiwan*) (where the Department found the respondent, Gourmet, to be the seller of the subject merchandise); *Polyvinal Alcohol from Taiwan*, 63 FR 32810, 32811-32813 (June 16, 1998) (where producers, Chang Chun and DuPont, both sold the subject merchandise); *Notice of Final Determination of Sales at Less Than Fair Value; Collated Roofing Nails From Taiwan*, 62 FR 51427, 51435 (Oct. 1, 1997) (*Roofing Nails From Taiwan*) (where all production of subject merchandise is the property of, and sold by, the tollee). None of the prior cases provides guidance to the Department on its selection of the appropriate respondent where the tollee does not sell the subject merchandise. As noted above, we have recognized that "the regulation does not purport to address all aspects of an analysis of tolling arrangements." *Polyvinyl Alcohol from Taiwan*, 63 FR at 32813. In some cases, we must make a determination based upon "the totality of the circumstances presented" in order to determine the appropriate respondent in a given case. *Id.*

In the case of LEU, all parties agree that the utility companies do not sell LEU. *Final French AD Determination*, 66 FR at 65879. As discussed above, the

utility companies are in the business of producing electricity for sale to consumers in the United States. To the extent that "the purpose of the tolling regulation is to identify the seller of the subject merchandise for purposes of establishing export price, constructed export price, and normal value," identifying the utility companies as the respondents would frustrate the purpose of the regulation to establish U.S. price and normal value for purposes of calculating dumping margins.

In light of the facts of this case, we must examine the totality of the circumstances in order to select the appropriate respondents in this case, as we did with respect to Perry in *Polyvinyl Alcohol from Taiwan.* Importantly, it was previously established in the case of LEU that enrichment is a required operation for the production of LEU; and that the enrichment process is a major manufacturing operation. *Final French AD Determination*, 66 FR at 65879. The Department found that enrichment accounts for an estimated 60 percent of the value of the LEU entering the United States. *Id.* at 65881. Thus, the Department concluded that "the enrichment processing adds substantial value to the natural uranium and creates a new and different article of commerce and therefore confers a different country of origin upon the product for purposes of the AD and CVD law." *Id.*

Further, the LEU at issue enters into the commerce of the United States. *Id.* The merchandise enters the customs territory of United States through U.S.

Customs ports of entry. Further, the merchandise is introduced into the commerce of the country for purposes of consumption in the United States. In every instance, the utility companies obtain LEU, a separate and distinct product of the respective country subject to investigation, under either an EUP transaction in which the full value of the LEU is contained in the contract, or through separate transactions for the purchase of the natural uranium feed component and the enrichment component. Given these facts, the Department has recognized that in every instance in which the utility customer obtains LEU for use in the generation of electricity, the merchandise is entering the commerce of the United States.[31]

The Department has recognized that once the merchandise enters the commerce of the United States, the Department must then determine the appropriate basis for establishing the price of the subject merchandise and its normal value, in order to calculate whether, and if so to what extent, dumping has occurred.

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31. The Uruguay Round Agreements Act implements the international obligations made by the United States with respect to, *inter alia*, the Antidumping Agreement. In particular, Article 2.1 of that Agreement states that "a product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." As noted above, in this case it is beyond dispute that the LEU at issue is being introduced into the commerce of the United States.

As discussed above, the regulation does not contemplate the circumstances of this case. Moreover, the statutory provisions governing the establishment of U.S. price are silent as to how the Department is to calculate the price of the subject merchandise in such circumstances.[32]

In our view, the facts in this case warrant a determination based on the totality of the circumstances, as it did with respect to Perry in *Polyvinyl Alcohol from Taiwan*, in order to select the appropriate respondent consistent with the limited purpose of establishing U.S. price and normal value. Based upon the totality of the circumstances in this case, we find that the enrichers are the producers of the subject merchandise because: (1) the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value; (2) the enrichers are the only companies engaged in the production of LEU, whereas the utility companies have no LEU production or manufacturing operations; (3) the enrichers control the production of MU; and (4) utility companies are industrial users and consumers of LEU. Apart from the determination of the producers, we also find that the enrichers are the

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32. For normal value, section 773(a)(4) states that "If the administering authority determines that the normal value of the subject merchandise cannot be determined under paragraph (1)(B)(1), then . . . the normal value of the subject merchandise may be the constructed value of that merchandise . . ." Section 773(e) states, in part, that the constructed value of imported merchandise shall be an amount equal to the sum of "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise . . ." *See* section 773(e)(1). 19 U.S.C. § 1677b(e)(l).

exporters of the subject merchandise, and therefore, separately qualify as the "exporters or producers" of the subject merchandise under the circumstances of this case. Each of these points, and its relevance, is discussed below.

(ii) *The Relevant Sales*

Prior to changing its practice with respect to subcontracting or tolling, as codified in the tolling regulation, the Department calculated dumping margins in tolling situations based upon the sale of the processing, where such processing involved substantial transformation and conferred country of origin on that product. In *Color Television Receivers, Except for Video Monitors, from Taiwan: Final Results*, 55 FR 47093, 47100 (Nov. 9, 1990), for example, where a Taiwan company assembled third-country parts supplied by a Hong Kong company, the Department treated the Taiwan company, the toller, as the producer and exporter, and based U.S. price upon the tolling fee charged by the Taiwan company to the Hong Kong company for the assembly. In *Final Determination of Sales at Less Than Fair Value: Certain Headwear from the People's Republic of China*, 54 FR 11983, 11988, (Mar. 23, 1989), the respondent, a Chinese company, toll-processed material supplied by a Hong Kong company into subject merchandise, and the Department based U.S. price on the fee paid for processing. Similarly, in *Certain Small Diameter Welded Carbon Steel Pipes and Tubes from the Philippines: Final Determination of Sales at Less Than Fair Value*, 51 FR 33099, 33100 (Sep. 18, 1986), a

U.S. importer purchased material inputs in Thailand and contracted with a toller in the Philippines to manufacture the inputs into pipe and tube. There, the Department treated the Philippine company as the respondent and calculated the margin for tolled sales based upon the price of the tolling charged by the Philippine company to the U.S, importer. In all of these cases, the producer, and thus the one selected by the Department as the respondent, was the entity actually engaged in the manufacture or production of the subject merchandise.[33]

The tolling regulation was promulgated to change the Department's practice in this area in order to calculate dumping margins based upon the full value of the sales of subject merchandise. Since the adoption of the tolling regulation, the Department has stated its preference to select the respondent whose price covers the full cost of production (*i.e.*, the full value of the subject merchandise). *See SRAMs Remand Determination*, at 4-5. In that case, the Department also stated that "[b]ecause a subcontractor does not sell 'subject merchandise,' but rather only sells services and/or inputs, the export price (or constructed export price) cannot be derived from the subcontractor's 'sales.'" *Id.* at 4.

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33. *See also Final Determination of Sales at Less Than Fair Value: Brass Sheet and Strip from Canada*, 51 FR 44319 (1986); and *Brass Sheet and Strip from Canada: Final Affirmative Determination of Circumvention of Antidumping Duty Order*, 58 FR 33610 (1993).

Our statements in that case, however, do not address the situation where the full value of the merchandise may not be reflected in any one transaction in the chain of commerce.[34] We did not intend to imply in *SRAMs from Taiwan* that a transaction cannot be subject to the antidumping law unless the price charged includes 100 percent of the value of subject merchandise. Nor did we intend to imply that a toller can never be selected to be a respondent, even in the situation where the tollee does not sell the subject merchandise, but rather uses or consumes such merchandise in its own production process. Accordingly, even if one were to focus solely upon the cash price paid by a utility customer in a SWU transaction, the fact that the cash price paid to the enricher may reflect less than 100 percent of the value of the imported LEU does not mean that the transaction is beyond the scope of the AD law. Transactions may occur whereby a party that might be considered a toller produces subject merchandise and transfers ownership to that merchandise to the purchaser (tollee) for consideration. As discussed below, under relevant Federal Circuit precedent, such transactions involve sales of subject merchandise.

In sum, our statements made in *SRAMs from Taiwan* fail to reflect the Department's authority to calculate margins where relevant sales may exist for

34. We note that, in a meaningful sense, enrichment transactions do reflect the full value of the LEU since the things of value provided by the utility customer to the enricher (cash and natural uranium) account for the full value of the LEU received by the customer from the enricher.

purposes of calculating the U.S. price and normal value of the merchandise. Where relevant sales exist that can form the basis of the price of subject merchandise and foreign like product, the Department must exercise its authority to examine those sales and determine whether, and if so, to what extent, dumping has occurred.

*Polyvinyl Alcohol from Taiwan* is also instructive in this context in that it demonstrates, to some extent, the flexibility the Department has in administering the provisions governing the establishment of U.S. price and normal value. In that case, the Department rejected the US. importer's claims that it, Perry, was the producer of the subject merchandise, even though it had sold the subject merchandise and purchased the major input, vinyl acetate monomer VAM), that was delivered to the processor, Chang Chun, to be manufactured into polyvinyl alcohol (*i.e.*, subject merchandise). Instead, the Department found Chang Chun, the processor, to be the producer. While the Department found that "the mere rearrangement of Perry's contractual relationship with Chang Chun insufficient to establish Perry as a producer of PVA," it is important to recognize that "Perry continued to purchase PVA from Chang Chun, albeit in two separate transactions instead of through a single purchase of the finished product." 63 FR at 32814. Accordingly, to calculate the price of the subject merchandise sold to Perry in that case, the Department added together the values from these two transactions to determine the U.S. price of the subject merchandise. *Id.* at 32815. Although the two relevant sales that were combined in that case – one sale of the processing and

one sale of the material inputs – were made by affiliated companies, the case, nevertheless, is instructive in that it recognizes that the sale of subject merchandise may occur in two distinct transactions, as compared to the traditional stand-alone transaction for the sale of subject merchandise, Second, it recognizes that the statute, while not addressing this situation, accommodates the interpretation that such relevant sales may be combined to derive, and calculate, the price of the subject merchandise.

In the case of LEU, as in the case of *Polyvinyl Alcohol from Taiwan*, the Department seeks to obtain the full value of the subject merchandise that has entered the commerce of the United States. Accordingly, in this case the Department calculated the price of the subject merchandise by combining the price of the enrichment component with the value of the natural uranium feed component to obtain the full value of the subject merchandise sold to U.S. utility companies. *Final French AD Determination*, 66 FR at 65885. The Department stated that

> In assigning a specific monetary value to the natural uranium component, we estimated the market value using the average price the enrichers charged their customers for natural uranium for LEU contracts. For SWU contracts, when comparing U.S. Price with Normal Value based on constructed value, we valued natural uranium using exactly the same value for both sides of the equation. For

> example, for any given shipment pursuant to a SWU contract we determined the quantity (i.e. kgs) of associated feed uranium by applying the industry standard formula for product and tails assay specified in the contract. We valued this quantity using POI average per kg price for natural uranium charged by enrichers. This exact same amount was included in normal value.

*Id.*

Based upon the way in which the utility companies obtain LEU in these circumstances, we find that the transactions between the enrichers and the utilities are relevant for purposes of establishing the price of the subject merchandise for a number of reasons. First, these sales represent the transfer of ownership in the complete LEU product for consideration. Based upon the contracts and other evidence of record, we find that the enrichers own, and hold title to, all the LEU they produce. The enrichers transfer ownership of, and title to, the LEU to the utilities upon delivery of the merchandise for consideration. Second, because the completed product is entering the commerce of the United States through these transactions and because the pricing behavior of the foreign enrichers is relevant to the issue of whether the LEU is being sold at less than fair value, we find that the enrichers' sales are relevant sales for purposes of establishing the U.S. price of the subject merchandise and its normal value under the facts and circumstances of this case. Each element is discussed below.

First, in this case, whether under EUP contracts or SWU contracts, the enrichers own, and hold title to, all the LEU they produce. In SWU contracts, the utility customers hold title to the natural uranium feedstock that they provide to the enrichers.[35] The contracts state that the enrichers transfer title to the LEU to the utilities upon production *and* delivery of the LEU.[36] At the time of delivery, title to the LEU is transferred to the customer, and title to the feed material is extinguished.[37] Based upon the terms of the contracts, the utility customers retain title to the feed material until such time as the LEU product is delivered to the destination specified in the contract. As the Court has recognized, however, "[t]hese contractual provisions acknowledge the fungible nature of feed uranium while establishing a legal fiction that the enrichment process will be performed on the uranium provided by the customer." Slip Op. 03-34, at 24. Accordingly, at the point

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35. *See, e.g.*, Urenco Questionnaire Response, Vol. 1, Attachment B-1, [*]. *See also* Attachment B-3, between [*] and Urenco, at [*]; and Attachment B-2, between [*] and Urenco, at [*].

36. *See, e.g.*, Urenco Questionnaire Response, Vol. 1, Attachment B-1, [*]. *See also* Attachment B-3, between [*] and Urenco, at [*]; and Attachment B-2, between [*] and Urenco, at [*].

37. *See, e.g.*, Urenco Questionnaire Response, Vol. 1, Attachment B-1, [*]. *See also* Attachment B-3, between [*] and Urenco, at [*]; and Attachment B-2, between [*] and Urenco, at [*] (stating that [*]. For Cogema/Eurodif contracts, *see, e.g.* the [*] and [*]; and in the contract between [*], *see also* the contract with [*]. The above contracts demonstrate that substantial evidence on the record reflects a standard approach in the industry with respect [*].

in time in which the enricher produces the LEU but before delivery is performed, the customer only holds title to the natural uranium feedstock provided to the enricher under the contract. The customer does not hold title to the LEU, nor does she hold title to the feed material contained within the recently produced LEU because the LEU produced by the enricher cannot be identified as having been derived from the feedstock provided by any particular customer. The terms of the contracts at issue indicate that at this point in time, the customer only has title to the feed material. The enricher, by contrast, would have rights as to the LEU.

Moreover, the record indicates that LEU delivered to a utility customer by an enricher under an enrichment contract may be produced before any natural uranium supplied by that customer could have been part of the production process for that LEU, thereby making it impossible to conclude that the LEU produced and delivered by the enricher is in any way derived from the uranium supplied by the customer. Based upon the above, we find that between the time in which the LEU is produced and the time in which it is delivered as specified under the contract, the enricher holds title and holds ownership in the complete LEU product. Because, under the terms of the contracts, the utility customers have no right of ownership with respect to the LEU that is produced, but not delivered, we find that the enrichers own the LEU, including the right to sell the LEU at issue to any buyer. Therefore, we find that the enrichers own all the LEU they produce.

Moreover, we find that enrichers make a relevant sale when they transfer ownership of the complete LEU to the utilities through the delivery of such merchandise for consideration. In *NSK Ltd. v United States*, the Federal Circuit addressed the meaning of the term "sold" in the definition of exporter's sales price (now CEP). In that case, the Court held that the term "requires both a transfer of ownership to an unrelated party and consideration." 115 F3d 965, 973 (Fed. Cir. 1997) (*NSK*). *See also AK Steel Corp. v. United States*, 226 F.3d 1361, 1371 (Fed. Cir. 2000).

As discussed above, the contracts in this case provide that title to the LEU product is transferred to the customers upon production and delivery of the LEU. At the time of delivery of the LEU product, the contracts provide that the utilities' title to the natural uranium feedstock is extinguished. Under the terms of the contracts at issue, the enrichers transfer ownership of the LEU upon delivery of the LEU. Accordingly, we find that the enrichers transfer title to, and ownership in, the complete LEU upon delivery of the LEU as specified under the contracts. Thus, under the test in *NSK*, the sales at issue in this case represent the sale of subject merchandise in that they are transfers of title to, and ownership in, the subject merchandise for consideration.

We have also examined the transfer of title in *SRAMs Remand Determination*. In that case, we placed little weight on the fact that the foundry held temporary title to the finished SRAM wafers and transferred title to the designs house. We stated that "while TSMC may

have held temporary title to the SRAM wafers in order to indemnify itself against the potential for loss, it did not, and could not, control the sale of these finished wafers because it never owned the intellectual property which is embodied within them." *Id.* at 5. In light of the decisions in and *NSK* and *AK Steel* we believe the Department was not precluded from selecting the foundry as the respondent in that case. Both entities, the foundry and the design house, held title to the finished product seriatim. In that case, however, the Department was faced with a choice of respondents, and used those sales that contained the full value of the subject merchandise, as contemplated by the regulation. Because the design house also owned the finished wafer, including the intellectual property contained within it and subsequently sold the subject merchandise, the Department selected the design house as the appropriate respondent.

There is, however, another important difference in these cases. In the case of LEU, the record shows that enrichers hold inventories of uranium from various sources, including uranium owned by the enricher itself, and produce LEU without relying solely upon the input from a particular customer.[38] This contrasts with the situation of the SRAM foundry in which the foundry does not own the intellectual property pertaining to the wafer design and "has no right to sell those wafers to any party other than the design house . . ." *SRAMs Remand*

38. Further, the record shows that COGEMA, the parent company of respondent, Eurodif, is a major world supplier of natural uranium for the production of LEU.

*Determination*, at 3. Unlike the case in SRAMs in which the foundry was prohibited from selling the finished wafer, the enrichers in this case are not prohibited from selling the undelivered LEU to other customers. Given these facts, the foundry in SRAMs may hold temporary title to the finished wafer, but because it is not free to sell the finished product, it does not appear to hold ownership in that product. By contrast, in this case, the enrichers retain ownership in the undelivered LEU.

In examining the totality of the circumstances in this case, we find it relevant that the completed product, LEU, is entering the marketplace through the transactions at issue. Utility customers cannot obtain LEU by purchasing enrichment alone. Rather, in every instance in which the utility customer enters into a SWU transaction, it is obtaining LEU. Moreover, the transaction by which the utility obtains the LEU constitutes a "sale of merchandise" under relevant Federal Circuit court decisions. As such, this is a relevant sale in that it is the transaction by which the merchandise enters the United States market.

Finally, under the circumstances of this case, we believe the transactions at issue are also relevant sales because the enrichment process is a significant portion of the value of the subject merchandise such that the pricing behavior of the foreign enrichers is relevant to the issue of whether the LEU is being sold at less than fair value. Based upon all of the above, we find that, under the facts and circumstances of this case, the sales

at issue are relevant for purposes of determining the price of the subject merchandise and its normal value.[39]

(iii) *The Role of Utility Companies in the Production of LEU*

The Court found that the designation by the utilities of particular assays for the LEU and for uranium tails was analogous to DuPont's provision of specifications to Chang Chun in *Polyvinyl Alcohol from Taiwan*, and to Akai's control of the specifications in *Certain Forged Stainless Steel Flanges from India* where the Department found these companies to be producers of subject merchandise. For LEU, the Court found that the designation of quantities and assays is bassd on (1) the design of the core reactor, which determines the level of U235 needed by that reactor, and (2) the utility's needs at a particular time, depending on its operating cycle and the amount of fuel that has been spent. *Id.* at 24-25. The Court stated that the utilities provide these specifications to the enricher, which then produces LEU in the required quantities and assays. *Id.* at 25. Citing *SRAMs from Taiwan* and *Certain Forged Stainless Steel Flanges from India*, the Court stated that "Commerce has previously indicated that control over the specifications of the final product was sufficient control to be considered a producer." *Id.* The Court noted that like the producer in *Certain Forged Stainless Steel Flanges*

39. We also note that, for the reasons set out at pages 86-88, below, in connection with the discussion of the applicability of the countervailing duty statute, that SWU transactions do not constitute the sale of a "service" under the ordinary meaning of that term or under other statutes addressing trade in services.

*from India*, the utilities control the specifications of the final product, even though, as in past determinations by the Department, "the actual processes of creating the product are left within the control of the tollers." *Id.* at 28-29.

In re-examining the above cases, we find the facts and circumstances to be very different from the case of LEU. In each of the cases cited by the Court, the tollee sold the subject merchandise, as contemplated by the regulation. Second, in nearly all of these cases, and in particular where the Department was required to examine the totality of the circumstances to determine the producer, the tollee engaged in manufacturing or processing operations. In no instance did the Department determine an entity was a producer based solely upon its purchase of an input and the designation of product specifications. If it were to do so, the Department would be unable to distinguish between purchasers, who do little more than provide specifications, and producers themselves.

The above cases need to be viewed in light of the relevant facts and circumstances, taken as a whole. For example, in *Polyvinyl Alcohol from Taiwan*, DuPont not only provided product specifications to the processor, it produced the major input, VAM, and sold the subject merchandise to unaffiliated customers in the United States. In *Certain Forged Stainless Steel Flanges from India*, the producer, Akai, not only purchased and retained title to the raw materials, and determined the quantity, size and type of flanges to be produced, it also

performed processing on most of the flanges, and, moreover, it sold the subject merchandise to unaffiliated customers in the United States. 58 FR at 68856. In *SRAMs from Taiwan*, the U.S. design house performed all of the research and development for the SRAM to be produced; it produced, or, at a minimum, arranged and paid for the production of, the design mask. *SRAMs Remand Determination*, at 3. In every instance the U.S. design house created the design that went into the SRAM wafer. The design did not equate to the provision of product specifications; rather, as the Department reasoned, "in an industry that is shaped by intellectual property considerations . . . the design is one of the primary determinants of the value of individual products." *Id.* at 5, (finding "no substantive difference" between the product design and development phase of production, equating design to a physical input).[40] Finally, in every instance, the U.S. design house sold the subject merchandise to unaffiliated customers in the United States. We find that in all of the cases, the respondent selected by the Department engaged in more than the purchase of the input and the provision of product specifications.

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40. By contrast, the product specification for LEU is not a proprietary design of the utility, whether the LEU is acquired under a SWU or an EUP contract. Further, LEU of a given assay is fungible with any other LEU of the same assay, can be delivered to any utility desiring such assay, and can be procured from any enricher under SWU or EUP contracts. Thus, the [missing text in original]

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With respect to whether the producer must engage in manufacturing or processing to be considered a producer, the Court found unpersuasive the Department's reasoning that the utility companies have no production facilities for the purpose of manufacturing subject merchandise. Citing *SRAMs from Taiwan*, *Certain Pasta from Italy*, and *Certain Forged Stainless Steel Flanges from India*, the Court noted that in prior determinations the Department found entities to be producers who did not maintain manufacturing facilities, but that this did not prohibit the application of the tolling regulation. *Id.* at 29.

Engaging in manufacturing operations is not a requirement under the regulation. In *Polyvinyl Alcohol from Taiwan*. however, the Department noted that the tolling regulation "only addresses the circumstances in which a toller will be considered a producer of the subject merchandise. Therefore, the Department is not restricted to the factors set forth in that regulation when determining whether a party other than a toller is the producer of merchandise under consideration," 63 FR at 32814. The Department went on to recognize the importance of engaging in production activities, noting that "while examining the production activities of a party may not be decisive in every case, whether a party has engaged either directly or indirectly in some aspect of the production of subject merchandise is an important consideration." *Id.* Importantly, in *Polyvinyl Alcohol from Taiwan*, DuPont produced the major input, VAM, that was sent to Chang Chun for processing into polyvinyl alcohol. *Polyvinyl Alcohol from Taiwan*, 63 FR at 32817. In that same case, the Department

rejected Perry's claim that it was a producer, based in part on the conclusion that the new tolling arrangement "merely reordered the contractual relationship between the parties, but had no significant effect on how they conducted business;" but also based upon the conclusion that "whether a party has engaged either directly or indirectly in some aspect of the production of the subject merchandise is an important consideration." *Id.* at 32814. Unlike DuPont, Perry did not engage, directly or indirectly, in any manufacturing operations. If Perry had done so, the new tolling arrangement would not have been a mere "reordering of the contractual relationship" because there would have been a significant change in how the company was conducting business. Accordingly, in that case, whether Perry engaged in manufacturing or production operations was relevant to the determination of whether Perry had ceased to be a purchaser and reseller, and had become the producer of the subject merchandise, as contemplated by the tolling regulation.

Where an examination of the totality of the circumstances is warranted in order to determine the producer of the subject merchandise, the performance of manufacturing or processing operations may take on added importance, as it did in the case of Perry in *Polyvinyl Alcohol from Taiwan*. In examining the functions performed by the tollee in *SRAMs from Taiwan*, for example, the Department found that "the design house performs all of the research and development for the SRAM that is to be produced. It produces, or arranges and pays for the production of, the design mask." *SRAMs Remand Determination*, at 3. The Department reasoned, *inter alia*, that "in an

industry that is shaped by intellectual property considerations . . . the design is one of the primary determinants of the value of individual products." *Id.* at 5. Thus, the U.S. design house produces the intellectual property that is one of the main components of value in the SRAM.

In the case of LEU, the facts and circumstances, taken as a whole, are significantly different from the above cases where the tollee was selected as the producer of the subject merchandise under the tolling regulation. In LEU, the utility companies make no sales of subject merchandise; nor do they engage in any manufacturing or processing operations related to production of the subject merchandise. Rather, the facts in this case indicate that utility companies are industrial users of the subject merchandise. And, as the utility companies themselves contend, they consume the subject merchandise. *Final French AD Determination*, 66 FR at 65879. As such, a finding that these companies are also producers of the subject merchandise would be at odds with the ordinary meaning of the term producer as one "who produces a commodity. Opp. to *consumer*." *See The New Shorter Oxford English Dictionary*, (1993 ed.), at 2367 (emphasis in original). To interpret the term "producer" in this context as encompassing industrial users and consumers of the subject merchandise would yield absurd results, and would be fundamentally in conflict with the legislative purpose of the statutory provisions to establish the price of subject merchandise and its normal value.

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Finally, with respect to the issue of control over the production of LEU, we find that the enrichment companies direct and control the manufacturing operations for the production of LEU sold pursuant to SWU contracts to the same extent they direct and control the production of LEU sold pursuant to EUP contracts. As such, the provision of product specifications by the utility customer does not, by itself establish a basis for the Department to fmd that utility companies are producers of LEU.

Unlike EUP contracts, an enrichment or SWU contract allows the customer to select the "transactional tails assay." By designating the transactional tails assay, the utility makes the decision of (1) the amount of natural feed uranium it must provide to the enricher in any given transaction; and (2) the amount of SWU to be paid for by the customer. In other words, the "transactional tails assay," a term that is well-known in the industry, allows a customer to optimize the amount of money and the amount of uranium it must provide for the LEU it will receive, based upon the commercial considerations of the customer. Their decision is based upon the commercial price of SWU and the commercial price of feed uranium.

By contrast, the transactional tails assay does not determine either the amount of natural uranium actually used by the enricher, nor the amount of energy actually expended by the enricher in producing the LEU under the contract. Rather, enrichers make business decisions as to whether they will overfeed or underfeed (*i.e.*, use

more feed uranium and less energy, or vice versa). These decisions are wholly within the decision-making of the enricher, and are based upon different commercial considerations than those faced by the utility customer.

In our view, the terms of the SWU contracts specify a transactional tails assay because this assay establishes the price for the quantity of LEU to be delivered. The contract terms, however, do not specify how the enricher is to produce the LEU. To the contrary, it is common practice in the industry for the enricher to determine how much feed to use and how much energy to expend in producing the required amount of LEU at the specified assay.[41]

To illustrate the point, enrichers do not run their enrichment facilities at different levels of feed input and energy input based upon whose feed is entering the production process or based upon whose LEU is being produced under a particular contract. Only the enricher makes these types of production decisions. This is further demonstrated by the fact that enrichers can, and frequently do, provide LEU under SWU contracts from LEU that has already been delivered to fabricators and that is listed as the enrichers' inventory on the books and records of the fabricator (*i.e.*, book transfers).

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41. Similarly, the notice provision in the SWU contracts also does not establish how the enricher is to produce the LEU under the contract. The purpose of the notice provision is to allow the utility company to determine how much feed material or how much money she will provide in any given transaction, as discussed above.

Indeed, book transfers are prevalent in the industry because LEU is largely a fungible product.

In sum, while a utility customer may select a "transactional tails assay" from a range of assays offered by the enricher and such a selection will determine the amount of SWUs the customer will have to pay for and the amount of uranium the customer must deliver to the enricher, it is the "operating tails assay" established by the enricher that determines the amount of energy and feed uranium that the enricher will actually use in its production of LEU. Accordingly, we find that enrichers have complete control over the enrichment process and control the amount of uranium and energy actually used in producing the LEU that is ultimately delivered to the customer. In addition, while the utilities direct the timing of when they want LEU delivered, the utility does not control the timing of when the LEU that is ultimately delivered is produced by the enricher or delivered by the enricher to the fabricator.

Finally, apart from our determination that the enrichers are the producers of the subject merchandise, the facts in this case also indicate that the enrichers are the "exporters" of the subject merchandise, as referenced under section 771(28) of the Act, and under sections 772(a) and (b) for purposes of export and constructed export price, and for normal value as well under section 771(28). Accordingly, the foreign enrichers as exporters of the subject merchandise separately qualify as respondents under the circumstances of this case.

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**Conclusion on Producer or Exporter For Purposes of U.S. Price and Normal Value**

Because enrichers make relevant sales that can be used to establish the U.S. price of subject merchandise and its normal value, engage in and control all aspects of enrichment processing, a necessary and significant manufacturing operation for the production of LEU, we find that, taken together, the facts and circumstances in this case indicates that the enrichers are the producers of LEU for purposes of establishing the U.S. price of the subject merchandise and its normal value. By contrast, because the utility companies do not sell LEU, but instead are consumers and industrial users of such merchandise, engage in no manufacturing operations of any kind related to the production of LEU, nor control the production of LEU, we find that, taken together, the facts and circumstances of this case indicate that utility companies are not the producers of LEU for purposes of establishing the U.S. price of subject merchandise and its normal value.

**Comments From Urenco/Eurodif and AHUG**

Urenco/Eurodif assert that unlike in the industry support section of the determination, where the Department analyzes the statutory requirements in close detail, in the antidumping duty portion of the Draft Remand Determination, the Department runs from the statute as if it were the plague. They argue that the statute is the centerpiece of this case, as it is the driver of the Department's entire tolling practice, including its tolling regulation.

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The respondents argue that, as the USEC Court described in detail, the Department has explicitly stated in its prior tolling determinations that the statute requires the Department to focus on a sale that captures all of the essential components of the subject merchandise. Urenco/Eurodif point out that, as the Court made clear, the Department recognized in *Polyvinyl Alcohol from Taiwan* that "the statute requires that we base comparisons on the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold to the home or third country markets, not the price of some processing of the subject merchandise." Urenco/Eurodif further contend that the Court also noted that the Department has uniformly taken the same position in every case since the adoption of its toiling regulation. In short, as the Court explained, "Commerce has recognized that where the price paid for the subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping duty law."

Given the foregoing, Urenco/Eurodif state that the Department's assertion that the statute is "silent as to how the Department is to calculate the price of the subject merchandise," where the tollee does not sell the merchandise, and its claim that "once the merchandise enters the commerce of the United States, the Department must then determine the appropriate basis for establishing the price of the subject merchandise and its normal value," are nothing short of disingenuous. Urenco/Eurodif contend that far from the principled

decision-making sought by the Court, the Draft Remand Determination seeks stubbornly to justify the Department's final determination by relying on a theory that has already been rejected by the Court as a justification for the treatment of SWU contracts as sales of subject merchandise and the recitation of differences that do not distinguish its tolling jurisprudence. In doing so, the respondents assert, the Department evades the essential point: how the Department should implement the principle behind its tolling practice, which is the statute's requirement that a sale of subject merchandise must capture all "essential components" of the price. These parties state that "[a]s the USEC Court recognized, because the sale of enrichment services does not capture the cost or price of the uranium input – a substantial portion of the value of the LEU – the Department cannot treat the sale of enrichment services as a cognizable sale under the law."

Urenco/Eurodif further point out in particular that the Department's attempt to distinguish its prior tolling cases as irrelevant because they involved the choice of respondent, not the scope of the antidumping duty law, contradicts the USEC Court's directive to consider that the fundamental principles underlying the tolling regulation cannot be confined to the choice of respondent. Urenco/Eurodif point out that, "as the USEC Court has noted the requirement that there be a sale of subject merchandise applies not only to the choice of the producer, but also to the determination of the basis of the export price used to calculate dumping margins." Urenco/Eurodif state that regardless of the context, the

statutory requirements mandate that the relevant sale under the antidumping duty law be made by "the company that is in a position . . . to sell at less than fair value in or to the U.S. market," USEC Inc., Slip Op. 03-34 at 15 n.9. Therefore, Urenco/Eurodif contend, the sale of the enricher's "subcontractor's services" cannot be equated to the sale of the subject merchandise, LEU.

Urenco/Eurodif also assert that the Department reinvents history by claiming that in the prior cases it merely "stated its preference to select the respondent whose price covers the full cost of production (*i.e.*, the full value of the subject merchandise)." Urenco/Eurodif contend that, as the Department explicitly recognized at the time, its determination was not an administrative "preference," but rather was required as a matter of law because, as noted above, the "statute requires that we base comparisons on the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold to the home or third country markets, not the price of some processing of the subject merchandise."

Moreover, Urenco/Eurodif contend that the Department's remand determination in *SRAMs from Taiwan*, which the Department now tries to offer in support of its argument, in fact explains why a processor cannot properly be chosen as a respondent: "because a subcontractor does not sell 'subject merchandise,' but rather only sells services and/or inputs, the export (or constructed export) price cannot be derived from the subcontractor's sales. Urenco/Eurodif assert that there is no principled basis for the Department to claim here

that it can "derive" the price of the subject merchandise where it previously said that such an approach was forbidden.

AHUG has separately addressed these same issues in its comments. AHUG first contends that the Department has not established that sales of enrichment services constitute relevant sales. Specifically, AHUG argues that the Department has failed to provide legitimate factual and legal bases for not applying the tolling regulation and its own precedents to the LEU investigations. AHUG divides its arguments into six main points.

First, AHUG asserts that the Department has no authority to disavow its tolling regulation when the Court has instructed it to reconsider the manner in which it applied the tolling regulation. Specifically, AHUG argues that the Department's assertion that in promulgating the tolling regulation, the Department only anticipated the situation in which the toller and tollee would make sales that could be construed as sales of subject merchandise and that the tolling regulation cannot be applied to the facts and circumstances of this case is not supported by the regulation nor its preamble. AHUG maintains that the regulation focuses on whether the toller owns the subject merchandise, controls its production, and makes the relevant sale and does not refer to the activities of the tollee. For these reasons, AHUG asserts that the Department lacks the authority to ignore the tolling regulation.

Moreover, AHUG argues that despite the Department's claim that *Polyvinyl Alcohol from Taiwan* provides justification for its position that the tolling regulation does not intend to address all facets of an analysis of tolling arrangements, the case does not provide a precedent for the Department's departure from the regulation. Instead, argues AHUG, the Court has already held that *Polyvinyl Alcohol from Taiwan* is not an applicable precedent because in this case the utility purchases the feedstock from a party unrelated to the enricher, and, therefore, the purchase of the feedstock confers no economic benefit on the enricher. AHUG maintains that the instant case involves a genuine tolling arrangement, unlike *Polyvinyl Alcohol from Taiwan*, and, therefore, *Polyvinyl Alcohol from Taiwan* is not applicable.

AHUG also argues that whether or not the enrichers engage in substantial manufacturing operations is irrelevant. AHUG states that it has explained why the Department's argument that the enrichers control the enrichment process is irrelevant under the tolling regulations in its letter from AHUG to Norman Y. Mineta Regarding Industry Support, December 19, 2000 at 8, AHUG Common Issues Brief at 17-18, and AHUG Opening Brief at 23.

Next, AHUG refutes the Department's assertion that the enrichers own, and hold title to, all the LEU they produce. AHUG maintains that the Court dismissed the Department's prior attempt to use *NSK v. United States*, 115 F.3d 965, 973 (Fed. Cir. 1997) ("*NSK*") as a

precedent, stating that it was inapplicable because "there is no finding that the enrichers' rights rise to the level of ownership . . .". AHUG asserts that the Court's remand recognized that (1) utilities have title to the uranium feed provided to enrichers; (2) enrichers may not sell a utility's feed to a third party; and (3) title to the feed remains with the utilities until the moment it is replaced by title to the delivered LEU.

AHUG refutes the Department's ownership arguments, stating that, in fact, there is no moment in which enrichers own the LEU enriched under enrichment services contracts because the enrichers do not own the uranium feed they use to fulfill enrichment services contracts. That feed, argues AHUG, is held by the enricher as a bailee for its utility customers. Under enrichment services contracts, the simultaneous transfer of the LEU and feed results in the transfer of the enrichment service (for which the enricher is paid) and the feed component (which the customer owns), in the form of LEU from the enricher as owner of the service and bailee of the feed component. Therefore, argues AHUG, the enricher must deliver LEU deemed to have been produced with the specific quantity of feed delivered to it by the customer and does not have the right, as claimed by the Department, to sell the LEU to any buyer. In addition, AHUG contends that, as a legal matter, the Court has already found that the enrichment process will be performed on the uranium provided by the customer.

Regarding the fact that the input is fungible, AHUG maintains that the draft remand determination does not offer any further justification for departing from the Department's past practice in the treatment of fungible goods.

AHUG's next point is that the Department can base its determinations only on relevant sales, which must comprise all elements of the value of subject merchandise. AHUG rejects the Department's claim that because the SWU transaction represents the final step in the purchase of LEU, it is a relevant sale in that it is the transaction by which merchandise enters the United States market. AHUG also dismisses the Departments rejection of its own precedent in *SRAMs from Taiwan*. AHUG states that given that *SRAMs* was affirmed by the Court on the basis that it fulfilled a statutory requirement, AHUG disagrees that the Department has the discretion to treat as relevant sales transactions that do not reflect all elements of the LEU value.

Moreover, AHUG maintains that *NSK* cannot be used to justify departing from the requirements of the statute. In *NSK* the Federal Circuit ruled that the Department could not include free bearing samples provided by the respondent to U.S. customers in its calculations because there had been no sale of that subject merchandise. Therefore, AHUG argues that since there is no sale of LEU in enrichment services contracts, *NSK* supports AHUG's position that those contracts cannot be included in the calculations of export price or constructed export price. AHUG adds that in

the circumstances of the instant case, it does not matter that the enrichers are exporters since under enrichment services contracts there is not a sale of the subject merchandise at a price reflecting all elements of its value.

In its final point, AHUG argues that the Court has already made clear that the Department failed to focus on the critical distinction between EUP and SWU transactions, *i.e.*, what is purchased. AHUG declares that the Department nevertheless uses imaginary transactions to construct a price by assigning a specific monetary value to the natural uranium component and that it estimated the market value using the average price the enrichers charged their customers for natural uranium for LEU contracts. However, AHUG argues, in enrichment services transactions, the enrichers do not charge utilities for the uranium feed and enrichers do not know the value of the feed. Therefore, the values used by the Department are not equivalent to what was purchased, AHUG maintains, and ignore the distinction between enrichment (SWU) and LEU (EUP) transactions.

**Department Position:**

As an initial matter, we disagree with Urenco/Eurodif and AHUG's interpretations of the Court's decision and remand as expressed in their comments. As we noted in the body of this determination, the Court recognized that the circumstances in this case appear to resemble in large part the tolling arrangements in earlier determinations, and could not reconcile the

Department's prior distinctions involving tolling with the Department's statements in this case. The Court specifically cited the Department's own statements made in the context of *SRAMs from Taiwan* and *Polyvinyl Alcohol from Taiwan* but further noted that it is well-established that the Department is authorized to depart from its prior practice as long as the agency articulates a reasoned analysis which demonstrates that the departure is supported by substantial evidence and in accordance with law.

On the issue of the Department's conclusion that neither the statute nor the regulation on tolling contemplates the particular facts and circumstances in this case, we make several points. First, respondents and AHUG's argument concerning the statute and regulation seem to rest on the premise that the Department can only make determinations where precedents and agency practice have been previously established. Respondents have noted that the Department has cited no administrative cases to support its position. In cases of first impression, however, where past practice does not address the facts and circumstances of a case, the Department is required to exercise its authority and interpret the statute in the manner intended by Congress.

Moreover, respondents do not cite any language in the statutory provisions governing U.S. price and its normal value to indicate that the price of the subject merchandise cannot be derived from the subcontractor's sales in any instance. We specifically recognized above

that past tolling cases do not address the facts and circumstances in the instant case. In their comments, respondents rely on the Court's statements that have properly focused the Department back upon its own statements made in the context of *SRAMs from Taiwan* and *Polyvinyl Alcohol from Taiwan*. Respondents, however, make no statutory argument as to why the Department's statements in those cases should be considered the only reasonable interpretation of the statute. Instead, respondents assert that the Department has reinvented history by stating a preference to select the respondent whose price covers the full cost of production. Respondents insist it was not an administrative preference, but rather was required as a matter of law because, again using the Department's own words, "the statute requires that we base comparisons on the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold to the home or third country markets, not the price of some processing of the subject merchandise." This is incorrect. In the original investigation in polyvinyl alcohol from Taiwan, as cited by the parties, for example, the Department's memorandum reflects a choice between four viable options presented to the decision-maker.[42] Not only does the memorandum reflect the Department's view that it was faced with a choice of respondents, but we note that none of the options included an exemption from the AD law for merchandise entering the commerce of the United States. *Id.* Further,

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42. *Memorandum From Team to Barbara R. Stafford, Treatment of DuPont's Sales of Polyvinyl Alcohol Tolled by Chang Chun*, (Aug. 8, 1995) at 5.

we note that if the Department were not faced with a choice of respondents, then it would have been required, as a matter of law, to treat Perry as a producer in the later administrative review in *Polyvinyl Alcohol from Taiwan*, based upon the contractual relationships, as discussed above.

More important, however, neither the tolling regulation nor the statute contemplate the circumstances of this case. In examining the statute and regulation, to the extent we stated that the AD law requires the sale of subject merchandise and not the sale of processing, the broad implication of those statements would mean that merchandise entering the commerce of the United States would be considered outside the parameters of the AD law. We recognize that the statute does not directly address this circumstance, and we reject the implication of those statements to the extent they may be interpreted to mean that the AD law does not apply to merchandise traded and entering the United States for consumption. In our view, the objective of the tolling regulation is to obtain the full price of the subject merchandise. We also recognize, however, that there can be cognizable sales without 100 percent of the value of the subject merchandise reflected in the relevant sale.

With respect to AHUG and respondents' arguments that the facts in this case are consistent with the facts in *NSK* where there was no price for the sale of samples, we find such reliance upon *NSK* to be misplaced. In that case, the Federal Circuit found that because the sample merchandise in question lacked consideration, no sale existed, and thus "they should not be included in

calculating United States price." *Id.* at 970. The Court held that a sale requires the transfer of ownership to an unrelated party for consideration. Unlike the case of *NSK*, in the case of LEU there are meaningful sales that can be used to calculate export and constructed export price, as discussed above. In light of the Federal Circuit decisions in *NSK* and *AK Steel*, we find the sales at issue to be relevant sales as the utility customer obtains LEU through a transaction in which ownership in the LEU is transferred for consideration.

AHUG and respondents also dispute the Department's finding as to the title and ownership of the LEU in question. The parties contend that the Court has already addressed this issue, and that the Department is attempting to evade the Court's holding on this issue. We disagree. The Court expressly stated why the Federal Circuit decisions in *NSK* and *AK Steel* were inapplicable, noting that "[a]s there is no finding that the enrichers' rights rise to the level of ownership, *NSK* is inapplicable." *USEC*, at 24, n. 12. In the *French Final Determination*, we examined the overall arrangement and did not address the ownership of the LEU and the transfer of ownership under *NSK*. The Department has now addressed this issue in the determination.[43]

43. We note that nothing in the statute prohibits the Department from combining separate transactions to obtain the U.S. price of the subject merchandise. In such a case, the activities of the producer and seller of the input and the activities of the processor may reasonably be considered together for purposes of establishing U.S. price, as such activities are tied together by the transactions to the U.S. customer, as it relates to the entry of merchandise into the United States.

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As to AHUG's allegation of imaginary transactions of feed uranium that formed the partial basis of the price of LEU, we disagree with AHUG's argument. As noted above, the Department seeks to obtain the full value of the subject merchandise. The Department specifically requested data from the respondents as to the value of the uranium feed. The Department has used the entry value of the feed as an estimate of the value of this component in order to obtain the value of the LEU at issue. This approach is consistent with the statute and fully comports with the Department's practice where specific information or data are unavailable.

Finally, with respect to AHUG and respondents' argument that whether enrichers control the enrichment process is irrelevant, we disagree. While we recognize, as stated above, that the relevance of the manufacturing operations is limited, we note that AHUG has attempted to view in isolation the factors used by the Department in making its determination that utility companies are not producers of LEU. As we stated above, the facts taken together indicate that the utility companies are not producers of LEU. Utility companies do not sell LEU, as contemplated by the tolling regulation, but instead are consumers and industrial users of such merchandise; they engage in no manufacturing operations of any kind related to the production of LEU, and do not control the production of LEU. The Department's determination is based upon these factors, taken together. While we recognize that a tollee is not required to engage in manufacturing operations directly, or to have facilities for such manufacturing, we also

recognize that where a company does not engage in any traditional manufacturing functions, and does not sell the subject merchandise, but rather acts in the capacity of a consumer of such merchandise, the entity is not satisfying any important functions either in the traditional sense or consistent with the purpose of the Department's tolling regulation – to calculate U.S. price of the subject merchandise and its normal value. Accordingly, if the Department were to treat U.S. utility companies as foreign producers, the purpose of the regulation would be defeated, and relevant sales would escape examination where such transactions may place the industry at risk from unfairly traded imports.

Urenco/Eurodif raise additional points. However, these points have been fully addressed in the body of this determination, and need not be repeated here.

## C. APPLICABILITY OF THE COUNTERVAILING DUTY STATUTE

### a. *The Department's Analysis of Countervailing Duties*

In the final affirmative countervailing duty determinations, the Department addressed the general scope of the countervailing duty law, and in particular the specific program in the case of France in which the Department found that the Government of France provided a countervailable subsidy by purchasing goods for more than adequate remuneration, under section 771(5)(E)(iv) of the Act.

For the general scope issue, the Department stated that "in conducting countervailing duty investigations, section 701(a)(1) of the Act requires the Department to impose duties if, *inter alia*, 'the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a chass or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States.' We believe the statute is clear that, where merchandise from an investigated country enters the commerce of the United States, the law is applicable to such imports." *Final French AD Determination*, at 65879.

For the program specific analysis of the purchase of a good for more than adequate remuneration with respect to LEU from France, the Department stated that "[b]ecause we have detennined that SWU contracts involve the purchase of LEU, we determine that these transactions constitute the purchase of goods." *Id.* at 65883, n. 7.

b. *The Court's Remand on the Countervailing Duty Investigation*

In addressing the Department's determination as to the general applicability of the countervailing duty law, the Court noted that the Department relied on the same rationale it employed in applying the antidumping duty law that because the LEU was entering the United States for consumption, the merchandise was subject to the law.

With respect to the specific program pertaining to "more than adequate remuneration" under section 771(5)(D)(iv) of the Act, the Court, noting that the Department had relied on the same analysis as in the antidumping context concerning the SWU contracts involving the purchase of LEU, stated:

> We have already determined that Commerce's determination regarding "functional equivalency" of EUP and SWU contracts is not supported by the record. Accordingly, we cannot sustain the Department's determination that for the purposes of applying the countervailing duty statute, SWU contracts involve the purchase of LEU.

*Id.* at 41. On remand, the Court stated, the Department will have an opportunity to reconsider the application of its tolling regulation to the transactions at issue here. The Court instructed the Department that it "must reconsider its countervailing duty determinations in that context." *Id.*

c. *Analysis of the Countervailing Duty Determinations*

(1) *General Applicability of CVD Law*

With respect to the general applicability of the countervailing duty (CVD) statute, we find that the law is applicable to the LEU entering the United States pursuant to SWU contracts. First, based upon the our analysis on remand in the antidumping context,

pertaining to sales made under the SWU contracts between foreign enrichers and U.S. utilities, we found that the enrichers own and hold title to the complete LEU product subject to these investigations, and transfer ownership and title to the utility customers for consideration. Based upon that analysis, these sales are also relevant for purposes of the CVD law.

Second, we also find that, unlike the antidumping law, where the statute refers to a class or kind of merchandise being sold at the less than fair value, the scope of the CVD law is clearer in that the plain language of the statute provides that the law is applicable where the merchandise is either imported, or sold for importation, into the United States. Section 701(a)(1) requires the Department to impose countervailing duties upon the merchandise if it determines that "the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailing subsidy with respect to the manufacture, production, or export of a class or kind of merchandise *imported, or sold (or likely to be sold) for importation,* into the United States." 19 U.S.C. § 1671(a)(1) (emphasis added).

Prior to the enactment of the Trade and Tariff Act of 1984 (1984 Act), section 701(a)(1) did not contain specific language pertaining to merchandise "sold (or likely to be sold) for importation." The legislative history of the 1984 Act indicates that Congress amended the provision to include sales of merchandise not yet

imported into the United States.[44] Based upon the language of the provision and the legislative history, we believe the law was amended, not for purposes of narrowing the scope of its application, but rather to broaden its application to include not only imports of subject merchandise, but also sales of such merchandise that occurred for importation. Accordingly, we interpret the CVD law to apply whenever a foreign goverment provides subsidies with respect to a class or kind of merchandise that is imported into the United States. In the case of LEU, there is no dispute that the merchandise at issue was imported into the United States. Accordingly, we conclude that the law is applicable to all imports of LEU from the respective countries under investigation.

Finally, because the tolling regulation was adopted for the limited purpose of providing guidance on the selection of the relevant sale for purposes of determining U.S. price and normal value under the AD law, it is not relevant for purposes of determining whether particular imports am subject to the CVD law. If a subsidy has been provided with respect to the production or importation

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44. Trade and Tariff Act of 1984, 98th Cong., 2d Sess., 98-39, at 26. *See also* Conf. Rept., 98-1156, at 75 and 165-66. The legislative history states that the change "is intended to eliminate uncertainties about the authority of the Department of Commerce and the ITC to initiate countervailing duty cases and to render determinations in situations where actual importation has not yet occurred but a sale for importation has been completed or is imminent." H.R. Re. No. 98-725, at 11 (1984), *reprinted in* 1984 U.S.C.C.A.N 4910, 5137.

of subject merchandise, countervailing duties may be imposed regardless of the characterization of the transaction (sale of goods or sale of services) pursuant to which such imports are made or the identity of the producer (toller or tollee) for purposes of the tolling regulation under the AD law. Accordingly, all of the subsidy programs which formed the basis for the calculation of the net subsidy rate in the CVD investigations on LEU from Germany, the Netherlands, and the United Kingdom, and the subsidy relating to the exoneration/reimbursement of taxes in the CVD investigation on LEU from France, would be unaffected by any determination as to whether enrichment transactions involve the sale of goods or services. For the reasons discussed below, we also conclude that the specific program in the French CVD investigation concerning the adequacy of remuneration involves a "financial contribution" within the meaning of section 771(5)(D) without regard to how SWU transactions are characterized for other purposes.

(2) *Program Specific Analysis*

With respect to the specific subsidy program in the French LEU case concerning the adequacy of remuneration, section 771(5)(D) lists financial contributions subject to the law as the following:

> (i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees,

(ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income,

(iii) providing goods or services, other than general infrastructure, or

(iv) purchasing goods.

19 U.S.C. § 1677(5)(D).

Section 771(5)(E)(iv) states that a benefit is conferred. "in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration." 19 U.S.C. § 1677(5)(E)(iv). Thus, the statute establishes that a countervailable subsidy exists where a government provides goods or services for less than adequate remuneration, but limits the application to goods, as compared to services, where a government makes a purchase for more than adequate remuneration. The legislative history does not explain the basis for the limitation to goods where the government makes a purchase under subsection 771(5)(D)(iv). We believe the provision is aimed at the producers of merchandise who obtain a benefit by selling their merchandise to the government for more than adequate remuneration.

In this case, we find that EdF purchased a good, LEU, for more than adequate remuneration. For the

same reasons that the SWU contracts involve the sale of merchandise in the antidumping context, we find that they involve the purchase of merchandise with respect to section 771(5)(D)(iv) of the Act.

We note that even if the transactions between EdF and Eurodif were not sales of merchandise, nonetheless, for two reasons EdF's payments of more than adequate remuneration to Eurodif were made in connection with EdF's "purchasing goods" as that term is used in section 77I(5)(D)(iv). First, there is no question that EdF obtains LEU in a series of purchase transactions (*i.e.*, the purchase of natural uranium, the purchase of conversion, and the purchase of enrichment). Accordingly, EdF's payment of more than adequate remuneration to Eurodif is made in connection with the major step in the process by which EdF is "purchasing goods."

Second, in our view, the fundamental purpose of the provision is to address subsidization of manufacturing operations that produce subject merchandise. In this context, the purchase of manufacturing or processing is a necessary component of the good. As a practical matter, goods include any manufacturing or processing that is necessary to produce the article. Thus, the sale of manufacturing or processing, which is a necessary component of the good, pertains to the purchase of goods, and does not constitute the purchase of a "service" in this context. The term "service" is not defined in the statute. Under its ordinary meaning, consistent with the purpose of section 771(5)(D), we interpret the term to mean "[t]he sector of the economy that supplies the

needs of the consumer but produces no tangible goods, as banking and tourism."[45] *The New Shorter Oxford English Dictionary*, 1993 ed., at 2789. This definition is also consistent with the U.S. government's negotiating position as to the distinction between goods and services in the international trade context. Section 2114(b)(5) of Title 19 of the U.S. Code, addressing international trade in services, states that the term "services" in this context means "economic activities whose outputs are other than tangible goods. Such term includes, but is not limited to, banking, insurance, transportation, postal and delivery services, communications and data processing, retail and wholesale trade, advertising, accounting, construction, design and engineering, management consulting, real estate, professional services, entertainment, education, health care, and tourism."

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45. *The New Shorter Oxford English Dictionary* defines the term for economic purposes as "The sector of the economy that supplies the needs of the consumer but produces no tangible goods, as banking and tourism." (1993 ed.), at 2789. That source also indicates that a service is "The provision or system of supplying necessary utilities, such as gas, water, or electricity, to the public; the apparatus of pipes, wiring, etc., by which this is done." Also "Expert advice or assistance given by a manufacturer or dealer to a customer after the sale of goods; the provision of the necessary installation, maintenance, or repair work to ensure the efficient running of machine etc.; a periodic routine inspection and maintenance of a motor vehicle etc." The ordinary meaning of the term indicates that a manufacturing operation producing a tangible good does not constitute a service within the meaning of the term. In this case, no party disputes the underlying fact that LEU is a tangible product resulting from the enrichment process.

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These definitions are relevant and useful for purposes of distinguishing between purchase transactions pertaining to goods and those pertaining to services. If a transaction is made that is directly related to the purchase of a good, such as the purchase of the manufacturing or processing component, for more than adequate remuneration, we interpret section 771(5)(D) to be applicable to the transaction, as explained further below.

In the case of LEU, even if, contrary to our finding above, the sales between EdF and Eurodif were solely for contract manufacturing, and were not found to be a transfer of ownership in the complete LEU, section 771(5)(D)(iv) of the Act would continue to be applicable to this circumstance because enrichment is a manufacturing operation leading to the production of a good. In this context, enrichment is not a service, but is instead a critical component of the LEU, just as any manufactured product has within it a manufacturing component. Moreover, one cannot purchase LEU without purchasing the enrichment component. Thus, the sales of enrichment are directly related to the purchase of LEU. Where such sales are made at more than adequate remuneration, the sales directly benefit the manufacturing operations leading to the production of LEU. Therefore, we believe the transactions at issue embody the very types of subsidies the law was intended to address under section 771(5)(D)(iv) of the Act.

However, even if the subsidy in the French CVD investigation were characterized as the purchase at more

than adequate remuneration of the "service" of producing the LEU, rather than the purchase of the LEU itself, the Department must look beyond the characterization to effectively administer the law. A payment of more than adequate remuneration to a producer of an acquired product may constitute a countervailable subsidy under section 771(5)(D) provided there is a nexus between the purchase transaction and the product acquired.

For example, where a foreign government purchases a good from a manufacturer, but separately purchases freight services from a company unaffiliated with the manufacturer, the statute does not contemplate the imposition of a countervailing duty on the provision of freight for more than adequate remuneration because any benefit provided to the freight provider by the government pertains to the purchase of a service, and does not benefit the production of merchandise.

If, on the other hand, the manufacturer of the merchandise provided both the merchandise and the freight service, but pursuant to separate transactions, the Department would need to examine closely the arrangement between the manufacturer and the foreign government. If the facts indicated that, on its face, the good appeared to be purchased at adequate remuneration, but that the remuneration for the freight service far exceeded the value of the service, the Department may reasonably infer that the remuneration pertaining to freight is so excessive that, as a practical matter, it is reasonably related to the purchase of the

merchandise (*i.e.*, a good that falls within the ambit of the provision). In such a case, the Department could reasonably conclude that the foreign government in this instance has provided a subsidy to the manufacturer in connection with the purchase of goods for more than adequate remuneration.

While the above example is not directly relevant to the facts and circumstances of the French CVD investigation, the example is useful in that it recognizes that countervailable subsidies may occur by a payment of more than adequate remuneration to a producer of goods for an activity provided by the producer in connection with the production and delivery of such goods. In the case of LEU, the purchase transactions are more directly related to the purchase of goods, as discussed above, than in the above example.

**Comments From Urenco/Eurodif and AHUG**

Ureneo/Enrodif argue that the Department offers two justifications for its finding that the CVD law is applicable to LEU entering the United States pursuant to SWU contracts: first, that the enrichment sale transaction is relevant "for purposes of the CVD law," and, second, that the CVD law is applicable to any merchandise imported into the United States. Urenco/ Eurodif assert that neither of these justifications supports the application of the CVD law to enrichment transactions.

Urenco/Eurodif first contend that their discussion in the AD context as to why an enrichment transaction is not a sale of merchandise applies equally to the Department's first justification in this context; and that no further discussion in the CVD context is necessary. As for the second justification, Urenco/Eurodif assert that the Department's finding flatly ignores the statutory requirement that countervailable subsidies be provided "with respect to the manufacture, production or export of a class or kind of merchandise." They argue that the fact that LEU is imported into the United States says nothing about whether the subsidies found by the Department are with respect to the manufacture or production of LEU. Since, as shown above and throughout this proceeding, the respondents are engaged in rendering enrichment services, they assert that any subsidies supporting this activity cannot properly be treated as having been bestowed with respect to the manufacture of LEU.

Urenco/Eurodif further point out that just as the antidumping duty statute is quintessentially concerned with evaluating sales of merchandise to determine whether there has been unfair price discrimination, the CVD law is concerned with whether countervailable subsidies have benefited the manufacture or production of merchandise. Correspondingly, just as the antidumping duty law can be applied only to the sale of merchandise, these parties assert that the CVD law can be applied only to the subsidization of the manufacture or production of merchandise. Respondents point out that the Department does not refer to any case where

the CVD law has been applied to the subsidization of a service, or where the reach of the CVD law has exceeded the reach of the antidumping law. Respondents conclude that there is no justification for the Department's finding that the CVD law is applicable to enrichment services transactions.

With regard to the French-specific program, respondents contend that since the Department's analysis in the antidumping context is completely flawed, it falls equally as hard when incorporated by reference here. Respondents contend there is no validity to the Department's alternative statement that "even if the sales between EdF and Eurodif do not involve sales of merchandise," there nonetheless can exist a countervvailable subsidy because "under these transactions EdF has acquired the LEU in purchase transactions in connection with the purchase of goods." Respondents contend that the Department's claim is faulty. The phrase "in connection with" does not appear in the statute, and the utility company is not purchasing goods. Respondents state that enrichment transactions involve the purchase of services. Accordingly, respondents point out, the Department inaccurately claims that the dictionary and section 2114b(5) of an unrelated portion of Title 19 establish that a true service is one that results in "no tangible goods." Respondents argue that the attempted analogy does not work. Since the customer already owns the uranium at the start of the transaction, it is not contracting for the purchase of a "tangible good," but rather only separative work, which clearly is an "intangible." In addition, section 2114b(5)

explicitly states that "construction" (which certainly results in the delivery of tangible goods) is included within the definition of services, thereby demonstrating that the fact that the services result in the final delivery of something tangible is irrelevant.

AHUG has also addressed this issue. AHUG first argues that "the Department cannot justify its conclusion that manufacturing services are not services." AHUG states that in the draft remand determination, the Department relies upon definitions of "services" that are neither consistent with the term's ordinary meaning nor the documented position of the U.S. government and foreign governments in international trade negotiations.

According to AHUG, *Black's Law Dictionary* defines "service" within the context of contracts to be "[d]uty or labor to be rendered by one person to another. . . . [t]he act of serving the labor performed or the duties required. . . . [p]erformance of labor for the benefit of another, or at another's command. . . ." AHUG states that Webster's New Universal Unabridged Dictionary includes in its definition of "service" "work done or duty performed for another or others." AHUG contends that neither of these definitions comports with the Department's suggestion that manufacturing services must be treated as sales of goods under the trade remedy law. AHUG points out that both of its definitions encompass the provision of enrichment services.

AHUG also states that it previously established, contrary to the Department's argument, that the U.S.

government considers uranium enrichment to be a service in the context of the General Agreement on Trade in Services (GATS) negotiations. In a submission to the WTO, the U.S. government defined energy services specifically to be "those services involved in the exploration, development, extraction, *production*, generation, transportation, transmission, distribution, marketing, consumption, management, and efficiency *of* energy, *energy products and fuels*." Further, AHUG contends the United Nations Central Product Classification (CPC), which the WTO members have adopted for the purpose of identifying service sectors covered by the GATS, includes energy-related services with "Manufacturing Services" (Division 88). Specifically, AHUG claims, Division 88 includes the "Manufacture of coke, refined petroleum products and *nuclear fuel, on a fee or contract basis*." According to AHUG, the explanatory notes to Division 88 provide that "Manufacturing Services" are "[s]ervices rendered on a fee or contract basis by units mainly engaged in the production of transportable goods, and services typically related to the production of such goods, and that "services incidental to manufacturing" include "manufacturing on a fee or contract basis, i.e. manufacturing services rendered to others where the raw materials processed, treated or finished are not owned by the manufacturer . . ." According to AHUG, the fact that manufacturing services cover such activities on a contract basis, where the raw materials processed are not owned by the toller (such as with enrichment of feed owned by utilities), confirms that uranium enrichment is a service distinct from the sale of LEU under trade law.

AHUG further states that it has previously pointed out that a number of countries have included manufacturing services in their schedule of commitments in the GATS, for example, Austria, Canada, Iceland, South Africa, the Dominican Republic, Indonesia, Kuwait, Malaysia, Nicaragua, Panama, Gambia and Lesotho, all of whom have undertaken to permit trade in manufacturing services.

**Department Position:**

We disagree with respondents' and AHUG's arguments on the application of the CVD law in general and the program-specific subsidy pertaining to the purchase of goods in the French CVD case.

AHUG argues that the Department "cannot justify its conclusion that manufacturing services are not services." AHUG challenges the Department's interpretation as being neither consistent with the ordinary meaning of the term nor the documented position of the U.S. government and foreign governments in international trade negotiations. *AHUG Comments*, at 18. AHUG points out that *Black's Law Dictionary* defines "service" within the context of contracts to be "[d]uty or labor to be rendered by one person to another . . . [t]he act of serving the labor performed or the duties required . . . [p]erformance of labor for the benefit of another, or at another's command . . ." *Id.* (citing *Black's Law Dictionary*, 6th ed. at 1368 (1990).

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The broad definition offered by AHUG would, if applied, turn the production of goods into a series of services composed of labor or work performed. As such, it does not provide a basis to distinguish between goods and services for purposes of the AD and CVD laws, or to distinguish between the General Agreement on Trade in Services (GATS) and the AD and CVD regimes established under the GATT and now within the WTO. In defining the term "services," *Black's Law Dictionary* states at the outset that "[t]he term has a variety of meanings, depending upon the context or the sense in which it is used." 5th Ed., at 1227. AHUG has cited to the contracts context. Under this definition, however, the international regimes established for the imposition of antidumping and countervailing duties would be subject to the terms and conditions specified in the parties' contracts. This is not a circumvention issue as much as it is an issue of form over substance. In this case, the respondents and AHUG agree that where LEU is sold pursuant to EUP contracts, any subsidies pertaining to the manufacture of the LEU are subsidies that pertain to the manufacture of goods. However, where the same subsidies pertain to the same manufacture of LEU that is sold pursuant to SWU contracts, AHUG and respondents propose that the subsidy no longer pertains to the manufacture of goods, but instead to services. Under such an interpretation, the contract alone would establish the parameters of the AD and CVD laws.

To administer these laws effectively and consistent with the intent of Congress, we recognize that where a purchaser obtains foreign goods, or where a government

obtains goods, the aim of the law to address unfairly traded imports, or to address subsidies pertaining to the purchase of goods for more than adequate remuneration. The object and purpose of these laws would be defeated if the Department were to adopt broad definitions of the term "services" in the context of the trade laws.

Second, the Department's definition reflects the position of the United States government with respect to its international obligations under the GATS. To be clear, the United States has made no commitment with respect to treating enrichment processing as a service within the meaning of the GATS. Nor has the United States made any commitment to treat LEU produced under contract manufacturing as an activity that is beyond the scope of the AD and CVD laws.

In making its arguments that enrichment processing is a service that falls within the ambit of the GATS, AHUG incorrectly assumes that the Provisional Central Product Classification of the United Nations (CPC) is controlling with respect to the commitments of the United States under the GATS. To the contrary, Article I of the GATS defines the services under GATS, not the CPC.[46]

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46. *See* General Agreement on Trade in Services. Further, the purpose of the CPC was to "provide a framework for international comparison of statistics dealing with goods, services and assets . . ." CPC at 5. The CPC itself recognizes that its function of providing such a framework for comparison of statistics does not extend to distinguishing goods from services. The CPC states that "[t]he

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Contrary to AHUG's presumption, the authoritative document relied upon by the WTO in its negotiations is a note from the Secretariat dated July 10, 1991, MTN.GNS/W/120. That document lists the services sectoral classifications. Under section 884 and 885, the document specifically lists "[s]ervices incidental to manufacturing." *Id.* at 4. Enrichment of uranium is not listed. Moreover, the United States considers enrichment of uranium to be no more "incidental to manufacturing" than any other manufacturing activity that produces such merchandise as textiles, microchips, or steel.

To interpret the GATS as AHUG has proffered would mean that many manufacturing operations that produce merchandise currently subject to the AD and CVD would, sua sponte, be outside the purview of the AD and CVD law based upon its listing in the CPC. For example, the same CPC lists "manufacture of textiles" and "manufacture of basic metals" – manufacturing operations that produce textiles and steel. *See* Provisional CPC, at 149-150. Pub. Doc. 85, Exhibit 1, at Fr. 30-31. Nothing in the AD and CVD laws, nor the GATS, supports a such a sweeping conclusion that anything listed in the CPC would be outside the scope of the unfair trade laws.

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precise distinction between goods and services is interesting from a theoretical point of view and may be relevant for the compilation and analysis of certain economic statistics. However, there is no need to embody such a distinction into a classification such as the CPC, which is intended to be for general purpose and to cover both goods and services." *Id.* at 9. Thus, the CPC may be used as a starting point in negotiations, but the listing of services contained in the CPC does not represent an authoritative expression of the United States' commitments under the GATS.

In addition, we note that the U.S. government document relied upon by AHUG (*i.e.*, a communication on energy services), dated December 18, 2000, was one of many proposals presented by the U.S. government in its negotiations on GATS. AHUG's Submission, Apr. 5, 2001, at Exhibit 3. As a proposal, the document demonstrates that there is no commitment currently in place, nor was there any commitment in place at the time period in which the agency conducted its AD and CVD investigations on LEU. Second, the document expressly states that the proposal is a "Draft - For Discussion Purposes Only" and that it is "intended to stimulate discussion." Exhibit 3, at Annex A, and Communication From The United States, at 1. The document also states that [t]his exercise does not prejudge the questions of whether all possible energy service activities are listed or which of these activities fall within the scope of the GATS." *Id.* at Annex A. Thus, AHUG's continued reliance upon it as a reflection of the United States commitments under GATS is misplaced. As a final point, AHUG notes that other countries have included manufacturing services in their schedule of commitments under the GATS, and notes, in particular, that Canada has scheduled commitments for "toll refining services." However, commitments by other countries neither reflect the commitments of the United States, nor bind the United States to such commitments.

Finally, with respect to Urenco/Eurodif's argument that the Department does not refer to any case where the reach of the CVD law has exceeded the reach of the AD law or where the CVD law has been applied to the subsidization of a service, we need to clarify that the CVD law does not exceed the reach of the AD law. In the draft

determination, we stated that, unlike the AD law, "the scope of the CVD law is clearer in that the plain language of the statute provides that the law is applicable where the merchandise is either imported, or sold for importation."

Based upon all of the above reasons and the analysis set forth in the body of this remand determination, we continue to find that the CVD law (and the AD Law) is applicable to the LEU at issue, and that the provision of subsidies through the French government's purchase of LEU for more than adequate remuneration is subject to the CVD law.

**Final Remand Determination**

This final redetermination is pursuant to the remand order of the Court of International Trade in *USEC Inc. and United States Enrichment Corporation v. United States*, Court Nos. 02-00112, 02-00113, 02-00114, and Consol. Court Nos. 02-00219, 02-0000221, 02-00227, 02-00229, and 02-00233, Slip Op. 03-34, (March 25, 2003).

s/ Joseph A. Spetrini
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

6-23-03
Date

## APPENDIX H — OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE DECIDED SEPTEMBER 16, 2003

**UNITED STATES COURT OF INTERNATIONAL TRADE**

**Court Nos. 02-00112, 02-00113, 02-00114, 02-00219, 02-00221, 02-00227, 02-00229, 02-00233**

USEC INC. and UNITED STATES ENRICHMENT CORPORATION,

Plaintiffs,

v.

UNITED STATES,

Defendant.

September 16, 2003, Decided

Before: POGUE, WALLACH, and EATON, Judges.

**OPINION BY:** Pogue

*Appendix H*

## OPINION

**Pogue, Judge**: In *USEC Inc. v. United States*, 27 CIT __, 259 F.Supp.2d 1310 (2003) (*"USEC I"*),[1] this Court remanded aspects of the final affirmative antidumping and countervailing duty determinations of the Department of Commerce ("the Department" or "Commerce") with regard to low enriched uranium ("low enriched uranium" or "LEU") from France, Germany, the Netherlands, and the United Kingdom.[2] The Court instructed Commerce to evaluate the applicability of its tolling regulation, 19 C.F.R. § 351.401(h), to determine whether the intervenors (the "utilities," also the "Ad Hoc

1. Familiarity with the Court's prior opinion is presumed.

2. The determinations challenged in the original action were *Low Enriched Uranium from France*, 67 Fed.Reg. 6,680 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination of sales at less than fair value and antidumping duty order); *Low Enriched Uranium from France*, 66 Fed.Reg. 65,877 (Dep't Commerce Dec. 21, 2001) (notice of final determination of sales at less than fair value) (*"LEU from France"*); *Low Enriched Uranium from France*, 67 Fed.Reg. 6689 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination and notice of countervailing duty order); *Low Enriched Uranium from France*, 66 Fed.Reg. 65,901 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determination); *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 67 Fed.Reg. 6,688 (Dep't Commerce Feb. 13, 2002) (notice of amended final determinations and notice of countervailing duty orders); *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 66 Fed.Reg. 65,903 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determinations).

Utilities Group" or "AHUG") should be designated as producers of LEU. *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1326. The Court further directed that if Commerce found the tolling regulation applicable, the agency should also (1) reconsider whether application of the regulation affects the determination as to which companies are "producers" for the purpose of the industry support determination, *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1328; and (2) reconsider its application of the countervailing duty laws. *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1329. The Court now reviews the results of the remand as presented in Commerce's *Final Remand Determination, USEC Inc. and United States Enrichment Corporation v. United States* (June 23, 2003) ("Remand Determ."). Jurisdiction lies under 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2000).

**Background**

The antidumping and countervailing duty investigations at issue here covered all low enriched uranium. Low enriched uranium is used to produce nuclear fuel rods, which in turn produce electricity in nuclear reactors. *See, e.g., USEC I*, 27 CIT at __, 259 F.Supp.2d at 1314. Uranium enrichment is one of five steps in the production of nuclear fuel.[3] *See id. LEU from*

3. The steps involved in nuclear fuel production are: (1) mining uranium ore; (2) milling and/or refining the ore into uranium concentrate, referred to as natural uranium ($U_{308}$); (3) converting the natural uranium into uranium hexafluoride (Cont'd)

*France*, 66 Fed.Reg. at 65,879. At issue in this proceeding is whether, for purposes of application of the antidumping and countervailing duty statutes, the "separative work unit" contracts entered into by the utilities and the companies that enrich the uranium feedstock (the "enrichers") constitute subcontracting arrangements involving the purchase of services or sales of enriched uranium.

As we more fully explained in *USEC I*, nuclear utilities employ two types of contracts for procuring LEU from uranium enrichers. *See, e.g., USEC I*, 27 CIT at __, 259 F.Supp.2d at 1314. One is a contract for enriched uranium product ("EUP contract"), in which the utility simply purchases LEU from the enricher. *See LEU from France*, 66 Fed.Reg. at 65,878, 65,884. In an EUP contract, the price paid for the LEU covers all elements of the LEU's value, including the feed uranium and the effort expended to enrich it. Transcript of Dep't of Commerce Hearing in the Matter of Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom (Oct. 31, 2001), Jt.App. Tab 6-A at 46 ("Hrg.Trans."). As noted in *USEC I*, all parties to this action agree that sales of enriched uranium product constitute sales of merchandise subject to the

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(Cont'd)

($UF_6$), or "feed uranium;" (4) enriching uranium hexafluoride to create low enriched uranium; and (5) using the low enriched uranium to fabricate nuclear fuel rods for use in nuclear reactors. *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1314; *see also LEU from France*, 66 Fed.Reg. at 65,879.

antidumping and countervailing duty laws. *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1314.

The second type of contract is called a "separative work unit" or "SWU" contract. A "separative work unit" is a measurement of the amount of energy or effort required to separate a given quantity of feed uranium into LEU and depleted uranium, or uranium "tails," at specified assays. *See LEU from France*, 66 Fed.Reg. at 65,884. Under a SWU contract, a utility purchases separative work units and delivers a quantity of feed uranium to the enricher. *LEU from France*, 66 Fed.Reg. at 65,878, 65,884-85.

As discussed in *USEC I*, because feed uranium is fungible, the specific feed uranium provided by a utility need not be used to produce LEU for that utility. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1315 (citing Resp. Br. of USEC, Inc. Opp'n Cogema/Urenco Mot. J. Agency R. at 16-17 & n.21). Enrichers maintain inventories of feed uranium, which is not segregated according to source or ownership, and any uranium held by the enricher may be used to produce LEU for any customer. *Id.*

Utilities purchase feed uranium from third parties,[4] and prior to delivering the feed uranium to the enricher, the utilities have title, risk of loss, power to alienate or sell, and use and possession of the feed uranium. The

4. Nothing in the record suggests that the parties from whom utilities purchase the feed uranium are in any manner related to the enrichers.

utility retains title to feed uranium supplied to the enricher until the enricher delivers the LEU ordered by the utility. In addition, at the time of delivery of the LEU, the enricher recognizes that title to the LEU is also held by the utility. As stated in one of the contracts in the record, "[t]itle to the Feed Material shall remain with [the utility] until the [LEU] Delivery associated with such Feed Material . . . at which time the Feed Material shall be deemed to have been enriched; whereupon [the utility] sha[ll] have title to such [LEU] associated with such Feed Material and title to such Feed Material will be extinguished." Uranium Enrichment Services Contract between [Utility A] and Urenco, Jt.App. Tab 3-F at JA-1364; *see also* Uranium Toll Enrichment Services Contract between [Utility B] and COGEMA, Inc., Jt.App. Tab 3-A at JA-1210; Uranium Enrichment Services Contract between [Utility C] and COGEMA, Inc., Jt.App. Tab 3-E at JA-1302; Uranium Enrichment Services Contract between [Utility D] and Urenco, Jt.App. Tab 3-G at JA-1399. In *USEC I*, we described the SWU transactions as follows:

> Pursuant to the SWU contracts, risk of loss or damage to the feed uranium, as well as use and possession, pass from the utility to the enricher upon delivery of the feed uranium to the enricher. However, the enricher does not obtain title to the feedstock; rather, actual title is at all times with the utility. Nor does the enricher have the power to sell a utility's feedstock to a third party. Moreover, it appears clear on this record that at the moment when the LEU is delivered to the utility by the

> enricher, the utility has title to and ownership of the LEU. The feed uranium does not become an asset of the enricher, nor is it ever reflected as such on the enricher's books and records.[5]

*USEC I*, 27 CIT at __, 259 F.Supp.2d at 1315 (internal citations omitted).

In reaching its original affirmative antidumping and countervailing duty determinations, Commerce found that under both LEU and SWU contracts the enrichers were producers of LEU for purposes of the less-than-fair-value determination.[6] The agency concluded that

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5. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1315-16 n. 5 (noting that (1) the foreign enrichers' records, which were verified by Commerce, did not reflect payments for customer-provided uranium, (2) USEC requires utilities to pay the property taxes on customer-provided uranium in USEC's possession, and (3) the record does not indicate that the enrichers treated customer-provided uranium as an asset).

6. To determine whether merchandise is being sold or is likely to be sold in the United States at less than fair value, Commerce compares the merchandise's normal value, or the price at which the merchandise is first sold for consumption in the exporting country, to the export price or constructed export price, which represents the price of the good when sold in or for export to the United States. *See* 19 U.S.C. § 1673; 19 U.S.C. § 1677a; 19 U.S.C. § 1677b(a). In making an export price or constructed export price determination, Commerce first must decide which company is the producer or exporter of the merchandise. *See* 19 U.S.C. § 1677a(a)-(b); *Taiwan Semiconductor Mfg. Co. v. United States*, 25 CIT __, __, 143 F.Supp.2d 958, 966 (2001).

EUP and SWU contracts were "functionally equivalent," in that "the overall arrangement under both types of contracts is, in effect, an arrangement for the purchase and sale of LEU." *LEU from France*, 66 Fed.Reg. at 65,884-85.

In *USEC I*, this Court concluded that the circumstances of the SWU transactions at issue resemble those of earlier cases involving "tolling" or "subcontracting" arrangements in which Commerce applied its tolling regulation, 19 C.F.R. § 351.401(h), to determine that the tollee, rather than the toll manufacturer, or subcontractor, was the producer of the subject merchandise. The Court therefore directed Commerce to assess the applicability of the tolling regulation, and thus, the propriety of designating the enrichers as producers of LEU and respondents in the antidumping and countervailing duty investigations. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1326, 1331. The Court also directed Commerce to explain why it applied a different definition of the term "producer" in the context of determining industry support than that used in the context of calculating the dumping margin. *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1328.

In its Remand Determination, Commerce concludes once again that the enrichers, rather than the utilities, are the producers of LEU, finding that (1) "the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value," (2) the enrichers "are the only companies engaged in the production of LEU," (3) the enrichers "control the

production of LEU," and (4) the utilities are "industrial users and consumers of LEU." Remand Determ. at 52. Commerce also explained that the different definitions of the term "producer" are warranted by the purposes underlying the relevant statutory provisions. *Id.* at 14-15, 22-23, 25.

**Standard of Review**

This Court will uphold an agency determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

**Discussion**

**I. Ownership of the Subject Merchandise**

Commerce bases its selection of the enrichers as the producers of LEU primarily on its conclusion that under the terms of the contracts, the enrichers own all of the LEU that they have produced but not yet delivered. *See* Remand Determ. at 52, 59. Commerce asserts that the enrichers transfer title to and ownership of the LEU to the utilities upon delivery of the LEU. *Id.* Therefore, Commerce argues, the delivery of the LEU effects a transfer of title and ownership for consideration, which constitutes a sale under *NSK Ltd. v. United States*, 115 F.3d 965, 973 (Fed.Cir.1997), and a relevant sale for the purposes of calculating a dumping margin. *Id.* at 59-60.

As we discussed in *USEC I*, however, the SWU contracts governing the transactions at issue establish a legal fiction that the very feed uranium delivered by a utility to an enricher is enriched and then returned as LEU to the utility. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1321-22; Oral Arg. Trans. at 33-34, 38, 41. The Court concluded that although the enrichers obtain the right to use and possess the feedstock, and assume the risk of loss or damage, there is no evidence that they ever obtain ownership of either the feed uranium or the final enriched product. *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1315, 1323; *see also* Oral Arg. Trans. at 30-35, 38, 41. Moreover, the contractual provisions addressing the retention of title in the feed uranium and passage of title in the LEU suggest an intention to establish a continuous chain of ownership in the utility while maintaining the enricher's ability to cover its obligations under the contract should it encounter difficulties in producing or providing LEU for a customer. *See, e.g.*, Oral Arg. Trans. at 33-34 (noting that the contractual provisions specifying that a utility obtains title to LEU are necessary because "if title to the product material were not specified clearly in the contract, there could be a question"), 38 ("[The enricher] receives material that it is holding for the account of the Utility customer, to be enriched and returned. And, when it is returned in enriched form, title passes to the enriched product. Title is extinguished in the feed."); Uranium Enrichment Services Contract between Cogema, Inc. and [Utility E], App. to Response of USEC to Dep't of Commerce's Remand Determ. of June 23, 2003, Tab 1 at JA-9003 ("USEC Remand App.");

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Uranium Enrichment Services Contract between [a utility] and Urenco, USEC Remand App. Tab 2 at JA-9074; *see also* contracts cited *supra* pp. 1337-1338. For example, these provisions enable the utility to claim the amount of feed uranium delivered, or the value thereof, from the enricher in the event that the enricher breached the contract. Such a contractual arrangement, which is apparently beneficial to both parties, is aided by the essential fungibility of the material at issue. Parsing the contractual provisions at issue does not lead to the conclusion that the enricher obtains ownership over the LEU and then sells it to the utility. Rather, the contracts delineate a transaction in which a utility provides raw material to an enricher, pays for the service of processing the material, and obtains the finished product after the manufacturing service has been performed.

Because the enricher does not obtain ownership of the LEU enriched under SWU contracts, the transfer of LEU by the enricher to the utility cannot constitute a sale of merchandise under *NSK Ltd. v. United States.* (*See* 115 F.3d 965, 975 (Fed.Cir.1997) (concluding that a sale "requires both a transfer of ownership to an unrelated party and consideration"). Nothing in Commerce's Remand Determination provides any evidentiary or legal basis for a contrary conclusion. Commerce's basic premise in the Remand Determination is that "the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value." Remand Determ. at 52. This statement, however, begs the question whether these transactions

can truly be construed as relevant sales of merchandise. Commerce's duty is to investigate "sales" at less than fair value. The agency's assertion that the enrichers' transactions with the utilities are the only transactions that could be such sales, without more, does not establish that there is an evidentiary or legal basis to conclude that those transactions constitute sales for purposes of our antidumping statutes.

Commerce's subsidiary factual determination is no more well-founded. Commerce asserts that because the utilities only hold title to the feedstock at the time prior to delivery, "the enricher, by contrast, would have rights as to the LEU." Remand Determ. at 58. Commerce, however, cannot and does not provide any evidentiary basis for this supposition; nothing in the record supports a determination that the enricher has any ownership rights. Accordingly, Commerce's determination is unsupported by substantial evidence and not in accordance with law.

## II. Equivalence of EUP and SWU Contracts

In addition to its claim that the enrichers obtain ownership of the LEU, Commerce also bases its conclusions upon the assertion that EUP and SWU contracts are fundamentally equivalent. Commerce states that

> the completed product, LEU, is entering the marketplace through the transactions at issue. Utility customers cannot obtain LEU

> by purchasing enrichment alone. Rather, in every instance in which the utility customer enters into a SWU transaction, it is obtaining LEU.

Remand Determ. at 61.

Commerce made essentially the same argument in its original determinations when it stated that "the overall arrangement under both [EUP and SWU] contracts is, in effect, an arrangement for the purchase and sale of LEU." *LEU from France*, 66 Fed.Reg. at 65,884. This Court dismissed that argument in *USEC I* when we stated that "under any tolling arrangement, the 'overall arrangement' is one for acquisition of a good, usually manufactured by the toller." *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1324. Furthermore, the SWU transaction does not account for the full value of the finished product; rather, it accounts only for the value of the enrichment processing. *Cf. Response to Court Remand, Taiwan Semiconductor Mfg. Co. v. United States*, Jt.App. Tab 7-A at JA-2604 (Dep't Commerce June 30, 2000) ("Under the Department's practice, the 'relevant sale' must be a sale by the company that owns the merchandise entirely, including all essential components, can dispose of the merchandise at its own discretion, and, thus, controls the pricing of the merchandise and not merely the pricing of certain portions of production. . . . In contrast, a subcontractor's or toller's price does not represent all elements of value. Rather, the subcontractor or toller merely performs one or more segments of the manufacturing process at the

direction of another entity. Thus, subcontracted production is distinguishable from other types of production because the subcontractor does not bear at least one element of cost which is essential to production of the subject merchandise.") (*"SRAMS Remand Response"*). Here, the SWU transaction represents approximately 65 percent of the value of the LEU, and is not equivalent to a sale of the finished product at its full value. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1325 (indicating that natural uranium supplies "approximately 35 percent of enriched uranium's total value").

Commerce states in a footnote that "in a meaningful sense, enrichment transactions do reflect the full value of the LEU since the things of value provided by the utility customer to the enricher (cash and natural uranium) account for the full value of the LEU received by the customer from the enricher." Remand Determ. at 54 n. 34. Yet this reasoning could be applied to any subcontracting case, including some of Commerce's earlier tolling cases, in which a tollee provides raw materials to the toll manufacturer and pays for the manufacturing services. For example, in *SRAMS from Taiwan*, the value of the wafer design and design mask provided by the design house plus the value of the manufacturing processes performed by the toller, considered together, reflect the full value of the finished product. In that case, however, Commerce recognized that the toller was paid only for the actual manufacturing processes, and that "a subcontractor's or toller's price does not represent all elements of value." *SRAMS*

*Remand Response*, Jt.App. Tab 7-A at JA-2603-04. In *Certain Pasta from Italy*, Corex provided the materials to the toller and paid the toller for its manufacturing services. 63 Fed.Reg. 53,641, 53,642 (Dep't Commerce Oct. 6, 1998) (preliminary results of new shipper antidumping duty administrative review). The payment to the toller was characterized as a "processing fee," and Commerce determined that Corex, rather than the toller, was the producer of the subject merchandise. *Id.* Commerce has stated that "[t]ypically, the subcontracting, or tolling, addressed by [the tolling regulation] involves a contractor who owns and provides to the subcontractor a material input and receives from the subcontractor a product that is identifiable as subject merchandise." *SRAMS Remand Response*, Jt.App. Tab 7-A at JA-2604. Consequently, we find unpersuasive Commerce's argument that the transaction between the tollee and toll manufacturer reflects the full value of the merchandise produced.[7]

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7. Commerce also cites to *Polyvinyl Alcohol from Taiwan* for the proposition that "the sale of subject merchandise may occur in two distinct transactions," and "such relevant sales may be combined to derive, and calculate, the price of the subject merchandise." Remand Determ. at 55-56 (citing *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. 32,810, 32,81[3-14] (Dep't Commerce June 16, 1998) (final results of antidumping duty administrative review)). The transactions in *Polyvinyl Alcohol from Taiwan* to which this comment refers are those between Perry and Chang Chun. Commerce determined that Chang Chun, the toller, was the producer of the subject merchandise and that the other company, Perry, was merely an importer and reseller. *See Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. 6,526,

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6,527 (Dep't Commerce Feb. 9, 1998) (preliminary results of antidumping duty administrative review). Perry had restructured its contractual arrangement with Chang Chun after Commerce found that Chang Chun was selling subject merchandise at less than fair value. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1320-21 n. 11 (citing *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. at 6,527). Under the restructured contract, Perry purchased inputs from an affiliate of Chang Chun and arranged delivery of the inputs to Chang Chun for processing. *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1321 n. 11 (citing *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. at 6,527). As we stated in *USEC I*, "[t]he crucial finding in *Polyvinyl Alcohol from Taiwan* was that, under the circumstances, Perry had simply restructured its payments to Chang Chun in an effort to circumvent the antidumping duties." *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1321 n. 11. By contrast, in considering DuPont's relationship with Chang Chun in the same case, Commerce held that DuPont was the producer of the subject merchandise because DuPont manufactured the primary input, shipped it to Taiwan for processing by Chang Chun according to specifications supplied by DuPont, and exported it from Taiwan back to the United States and to third countries. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1320 (citing *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. at 6,527).

The instant case is more similar to the contract between DuPont and Chang Chun than to the contract between Perry and Chang Chun. First, in the course of managing the sequential steps in the production of nuclear fuel, the utility purchases uranium feedstock from a third party and pays the enricher to process it into LEU. *See, e.g., USEC I*, 27 CIT at __, 259 F.Supp.2d at 1314-15. Second, the utility does not merely import and resell LEU. Finally, the contractual arrangement here long

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## III. The Tolling Regulation, 19 C.F.R. § 351.401(h)

In the Remand Determination, Commerce again concludes that the tolling regulation does not apply in this case to designate the utilities as producers of LEU for purposes of calculating export price or constructed export price. *See* Remand Determ. at 47, 52. As in its original determinations, Commerce concludes that the enrichers are the producers of LEU. *Id.* at 45, 52, 56-57.

In explaining its decision, Commerce reasons that the tolling regulation "does not purport to address all aspects of an analysis of tolling arrangements," and that the agency looks at the totality of the circumstances in making its determination. Remand Determ. at 49 (quoting *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. at 32,813). Commerce distinguishes the prior tolling cases cited by the Court in *USEC I* on the grounds that in each of those cases, the agency "faced a choice of respondents, based upon its analysis of the sales made by two entities—the toller on the one hand, and the tollee on the other." Remand Determ. at 48. Commerce argues that in each of the earlier cases,

> the tollee sold the subject merchandise, as contemplated by the regulation. Second, in

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predates the initiation of unfair trade investigations. *See, e.g.*, Hrg. Trans., Jt.App. Tab 6-A at 43-45; Oral Arg. Trans, at 42. Unlike the contract referred to in the Remand Determination, the SWU contracts here are not simply restructured purchase contracts.

> nearly all of these cases, and in particular where the Department was required to examine the totality of the circumstances to determine the producer, the tollee engaged in manufacturing or processing operations. In no instance did the Department determine an entity was a producer based solely upon its purchase of an input and the designation of product specifications.

Remand Determ. at 62-63. The agency says that in this case, by contrast, the tollees did not sell the completed merchandise. As the utilities made no sales of the subject merchandise, Commerce claims that they cannot be designated as respondents for the purpose of establishing export price or constructed export price. Therefore, Commerce concludes, "the tolling regulation cannot be applied to the facts and circumstances of this case without defeating the purpose of the regulation and the statutory provisions that the regulation is designed to implement." Remand Determ. at 47. Commerce asserts that the tolling regulation does not contemplate the circumstances of this case, and that "the statutory provisions governing the establishment of U.S. price are silent" as to how to calculate U.S. price in such circumstances. *Id.* at 51; *see also id.* at 47 ("A fundamental requirement upon which the tolling regulation is premised is that merchandise produced through a tolling operation is sold to a party in the United States. . . . In promulgating the tolling regulation, the Department did not contemplate the situation in which the tollee makes no sales of subject merchandise.").

Commerce thus proceeds to evaluate "the totality of the circumstances in order to select the appropriate respondents." Remand Determ. at 50.

It is certainly true that the tolling regulation does not "address all aspects of an analysis of tolling arrangements," Remand Determ. at 49 (quoting *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. at 32,813), and that the agency may look at the totality of the circumstances in making a determination. *See, e.g.*, *Stainless Steel Bar from India*, 66 Fed.Reg. 13,496, 13,496 (Dep't Commerce Mar. 6, 2001) (preliminary results of new shipper antidumping duty administrative review) ("In determining whether a company that uses a subcontractor in a tolling arrangement is a producer pursuant to 19 C.F.R. [§] 351.401(h), we examine all relevant facts surrounding a tolling agreement."); *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. at 32,813 ("[W]hen determining whether a party is a producer or manufacturer of subject merchandise, we look at the totality of the circumstances presented."). Nonetheless, we find Commerce's continuing attempts to distinguish its earlier tolling cases from the instant case unpersuasive.

In support of its assertions, Commerce relies primarily on *SRAMS from Taiwan* and *Polyvinyl Alcohol from Taiwan*, in which the tollees participated in manufacturing or processing operations. *See SRAMS Remand Response*, Jt.App. Tab 7-A at JA-2603, JA-2605 (finding that the tollee design house engaged in research and development, thereby producing the intellectual

property that was "one of the primary determinants of the value of individual products"); *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. at 6,527; *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. at 32,817 (concluding that DuPont was the producer of the subject merchandise, because it manufactured the primary input and shipped it to a toller for further manufacturing).

In a number of other cases, however, it appears that the tollee did not engage in manufacturing or processing operations, and was determined to be a producer based on procurement and continued ownership of inputs or raw materials, payment of processing fees to subcontractors for manufacturing, and overall control of the series of processes (such as purchasing inputs, procuring manufacturing services, and marketing and sales services) involved in creating the final product. In *Certain Pasta from Italy*, Commerce determined that Corex was the producer of the subject pasta because Corex "(1) purchase[d] all of the inputs, (2) pa[id] the subcontractor a processing fee, and (3) maintain[ed] ownership at all times of the inputs as well as the final product." *See* 63 Fed.Reg. at 53,642. Corex also was "solely responsible for the marketing and sales of the product and any freight arrangements." *Id.* Corex's involvement in the production of the subject merchandise apparently involved not manufacturing or processing, but managing the successive steps in production of the subject merchandise by procuring and maintaining ownership of the material inputs and subcontracting the manufacturing processes. In *Certain Forged Stainless Steel Flanges from India*, Commerce found respondent

Akai the producer of the subject merchandise, even though Akai did not own the machinery used in producing flanges and apparently did not engage in the actual manufacturing processes 58 Fed.Reg. 68,853, 68,855-56 (Dep't Commerce Dec. 29, 1993) (notice of final determination of sales at less than fair value). Instead, Commerce's conclusion was premised on the following facts:

> Akai purchase[d] and maintain[ed] title (during the entire course of production) to the raw materials used for the production of the vast majority of the flanges, and . . . direct[ed] and control[led] the manufacturing process insofar as it determine[d] the quantity, size, and type of flanges to be produced. . . . Akai control[led] the costs for all elements incorporated in the production of the flanges.

*Id.* at 68,856. In explaining its conclusion, Commerce stated that "[t]he Department is required to capture all the costs involved in the production of the subject merchandise, and must therefore look to the company that controls the costs of production of the merchandise." *Id.; see also* Dep't of Commerce Mem. from Joseph A. Spetrini to Troy Cribb, *Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Stainless Steel Butt-Weld Pipe Fittings from Italy* at 3 (Dec. 27, 2000) (unpublished), *at www.ia.ita.doc.gov/frn/index.html* (concluding that a company that "perform[ed] all marketing and selling functions," "purchased the raw

material," and "maintained ownership of all materials sent . . . for further production" was the producer of subject merchandise, while the two companies that actually performed manufacturing operations were tollers and not producers); *Stainless Steel Bar from India*, 65 Fed.Reg. 59,173, 59,174 (Dep't Commerce Oct. 4, 2000) (preliminary results of new shipper antidumping duty administrative review) (finding a company the producer of the subject merchandise where it "(1) [p]urchase[d] all of the inputs, (2) pa[id] the subcontractor a processing fee, and (3) maintain[ed] ownership at all times of the inputs as well as the final product").

In other cases, it appears that the tollee did engage in manufacturing or processing operations, but this fact was not crucial to Commerce's determination that the tollee was the producer. *See, e.g.*, Dep't of Commerce Mem. from Joseph A. Spetrini to Faryar Shirzad, *Issues and Decision Memorandum for the Administrative Review of Certain Stainless Steel Wire Rod from India for the Period of Review ("POR") Covering December 1, 1999 through November 30, 2000* at 5 (May 29, 2002) (unpublished), *at www.ia.ita.doc.gov/frn/index.html* ("[T]he sub-contractor is not the producer of the wire rod, because the companies of the [tollee] Viraj Group retain ownership of the material and control the sale of the subject merchandise; therefore, [the Viraj companies] are producers of subject merchandise."). As we stated in *USEC I*, " 'Commerce's construction of "producer," as memorialized in [the regulation], emphasizes three factors: (1) ownership of the subject

merchandise; (2) control of the relevant sale . . .; and (3) control of production of the subject merchandise.' " *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1318 (quoting *Taiwan Semiconductor Mfg. Co. v. United States*, 25 CIT at __, 143 F.Supp.2d at 966).

In the production of LEU, the utilities manage the successive processes in the production of nuclear fuel, using contractors that perform mining and milling of uranium, conversion of uranium into uranium hexafluoride, enrichment of uranium hexafluoride to obtain LEU, and fabrication of nuclear fuel rods. *See, e.g.*, *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1314, 1322. The utilities manage the entire process of creating nuclear fuel in order to manage costs and assure a steady and reliable supply of fuel. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1316; Oral Arg. Trans. at 47, 53-54. Enrichment is merely one step in this process, and the utilities obtain it by providing a raw material to a subcontractor and paying for the service of enrichment. As discussed in *USEC I*, the utilities' management of the process of producing nuclear fuel and their relationship with the enrichers under SWU contracts render this case very similar to the tolling arrangements seen in earlier cases. Consequently, the fact that the utilities do not subsequently sell the finished product, but rather consume it in the production of electricity, does not render the tolling regulation inapplicable. Moreover, as noted in section I, *supra*, nothing in the record provides a basis for determining that the tolling arrangements at issue here constitute sales that may be considered equivalent to the full-value sale of a finished

product. Accordingly, Commerce's determination that its tolling regulation is inapplicable to this case is neither supported by substantial evidence nor in accordance with law.

## IV. Definitions of "Producer" in the Contexts of Industry Support and the Determination of Export Price or Constructed Export Price

In *USEC I*, the Court directed Commerce to assess whether the definition of "producer" in the industry support context should differ from the definition applied in the context of determining export price or constructed export price. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1328. In addition, the Court directed that "[i]f Commerce finds that the tolling regulation applies here, the agency must consider whether those entities determined to be 'producers' under the tolling regulation are also 'producers' for purposes of the industry support determination." *Id.*

In its Remand Determination, Commerce concludes that in order to qualify as the producer of a good for the purposes of industry support, a company must have a "stake" in the domestic industry, which the agency interpreted to mean that a company must be engaged in the "actual production of the domestic like product" in the United States. Remand Determ. at 13 (quoting S.Rep. No. 96-249 at 47 (1979)), 15-16. Commerce reasoned that "[w]hether a company is at risk from unfairly traded imports depends on the nature and extent of its operations in the United States. It stands

to reason that a company may be injured by unfairly traded imports where it is in the business of producing the domestic like product." *Id.* at 14. Commerce further reasoned that the tolling regulation is inapplicable in the industry support context because its application could lead to the inclusion of companies within the domestic industry that would not be adversely affected by unfairly traded imports of merchandise. *See* Remand Determ. at 16. Commerce claims that such an outcome would defeat the purpose of the unfair trade laws, which exist to aid domestic producers adversely affected by unfair trade. *See id.* at 16-17; *see also Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed.Cir.1995) ("The purpose underlying the antidumping laws is to prevent foreign manufacturers from injuring domestic industries by selling their products in the United States at less than 'fair value,' i.e., at prices below the prices the **1346 foreign manufacturers charge for the same products in their home markets."); *Tung Mung Dev. Co. v. United States*, 26 CIT __, __, 219 F.Supp.2d 1333, 1338-39 (2002).

In the context of the less than fair value determination, Commerce maintains that the purpose and intent of the statute warrants application of a different definition of "producer" than is used in the industry support context. Commerce explains that 19 U.S.C. §§ 1677a and 1677b focus on the price of a good, rather than on its manufacture. Remand Determ. at 22-23. Section 1677a refers to the "producer or exporter" of a good in connection with selecting an appropriate respondent and sale price. *Id.* at 22; 19 U.S.C. § 1677a(a)-

(b). Commerce explains that in this context, it may be appropriate to select a toller as the producer when that company, although it may not actually manufacture the good, is responsible for setting the price "at which the merchandise is first sold (or agreed to be sold) before the date of importation." 19 U.S.C. § 1677a(a)-(b); Remand Determ. at 23-24 & n.21.

Absent application of the tolling regulation to the industry support context, Commerce again concludes, as it did in the original determinations, that USEC is the sole domestic producer of LEU. Remand Determ. at 18-20. The agency concludes that for purposes of the industry support determination, the utilities are industrial users and purchasers of LEU, rather than producers, because they do not actually produce LEU in the United States and they do not maintain any manufacturing operations or facilities for the production of LEU. *Id.* at 19-20 (noting also that the "business interest" of the utilities, "like that of any industrial user, lies in obtaining lower priced LEU in an effort to keep the cost of producing electricity down"). Consequently, as Commerce concludes that USEC is the sole domestic producer of LEU, the agency finds that the petitions had support within the domestic industry as required by 19 U.S.C. § 1673a(c)(4). *See id.*

In explaining why it applies the tolling regulation in establishing export or constructed export price, but not in the industry support determination, Commerce has articulated reasons that are consistent with the purposes of the two sections of the statute. In accordance with

Commerce's reasoning, we acknowledge that in this case, the utilities would benefit from, rather than be injured by, the availability of lower-priced LEU or enrichment services provided by foreign companies. Consequently, the Court finds Commerce's application of different definitions of "producer" in these two contexts is reasonable and therefore in accordance with law. *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed.Cir.2001); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). As the Court upholds Commerce's reasons for declining to apply the tolling regulation in the industry support context, we also uphold the agency's finding that USEC is the sole member of the domestic industry for the purposes of satisfying the industry support requirement and permitting the investigation to proceed. *See* 19 U.S.C. §§ 1673a(b)(1), 1673a(c)(4)(A).

## V. Applicability of the Countervailing Duty Statute

Title 19 U.S.C. § 1671 provides that Commerce may impose countervailing duties where it determines that a government or public entity within a country is providing a countervailable subsidy[8] "with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for

8. A "countervailable subsidy" is a "financial contribution" or "any form of income or price support" that confers a benefit. 19 U.S.C. § 1677(5).

importation, into the United States," and imports of that merchandise injure or threaten to injure a domestic industry.[9] In its Remand Determination, as in its original

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9. 19 U.S.C. § 1671(a) states that

If —

(1) the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and

(2) in the case of merchandise imported from a Subsidies Agreement country, the Commission determines that-

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

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determinations, Commerce concludes that the countervailing duty provisions are applicable to both EUP purchase contracts and SWU enrichment contracts.

In the Remand Determination, Commerce notes that "the scope of the CVD law is clearer [than the scope of the antidumping law] in that the plain language of the statute provides that the law is applicable where the merchandise is either imported, or sold for importation, into the United States." Remand Determ. at 84. The agency "interpret[s] the CVD law to apply whenever a foreign government provides subsidies with respect to a class or kind of merchandise that is imported into the United States," and states that "[a]ccordingly, we

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> then there shall be imposed upon such merchandise a countervailing duty . . . equal to the amount of the net countervailable subsidy.

19 U.S.C. § 1671(a). "Subsidies Agreement country" is defined in 19 U.S.C. § 1671(b) to mean countries that are WTO members or as to which the United States has undertaken certain obligations. In the case of non-Subsidies Agreement countries, no determination of injury or threat of injury to the domestic industry is required. 19 U.S.C. § 1671(c). France, Germany, the Netherlands, and the United Kingdom are Subsidies Agreement countries. *See* Membership of the World Trade Organization, WTO Doc. No. 95-2450, WT/L/51/Rev.4 (Aug. 18, 1995), at *http://docsonline.wto.org;* Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144, 1144 (1994) (providing that multilateral agreements included in Annex 1, which includes the Subsidies Agreement, are binding on all WTO members).

conclude that the law is applicable to all imports of LEU from the respective countries under investigation." *Id.* at 85.[10]

The language of the countervailing duty provisions states that duties may be imposed where (1) merchandise is imported and (2) a countervailable subsidy has been provided "with respect to the manufacture, production, or export" of that merchandise. 19 U.S.C. § 1671(a)(1). Thus, no sale of the subject merchandise is required for the application of the countervailing duty statute. Moreover, in the countervailing duty context, the enricher may be considered to "manufacture" or "produce" LEU by performing the processing operations that transform feed uranium into enriched uranium.[11] *See, e.g., Oxford English Dictionary* at

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10. Commerce also states that "based up [its] analysis" that the enrichers "own and hold title to the complete LEU product . . . and transfer ownership and title to the utility customers for consideration . . . these [SWU contract] sales are also relevant for purposes of the CVD law." Remand Determ. at 83-84. As discussed above, we find incorrect Commerce's conclusion that pursuant to the SWU contracts the enrichers own and transfer ownership in the complete LEU. Consequently, contrary to its statement in the Remand Determination, Commerce's conclusion that SWU transactions are sales of subject merchandise cannot lend support to Commerce's countervailing duty finding. *See id.*

11. We concluded in section III, *supra*, that Commerce's tolling regulation applies in the antidumping context to designate the utilities as "producers" of LEU. That regulation, which is applicable in the context of determining export price or

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*www.oed.com* (defining the verbs "produce" as, *inter alia*, "[t]o bring forth, bring into being or existence .... [t]o bring (a thing) into existence from its raw materials or elements, or as the result of a process; to give rise to, bring about, effect, cause, make" (an action, condition, etc.) and "manufacture" as, *inter alia*, "[t]o make (a product, goods, etc.) *from, (out) of* raw material; to produce (goods) by physical labour, machinery, etc." and "[t]o make up or bring (raw material, ingredients, etc.) into a form suitable for use; to work up *as* or convert *into* a specified product") (emphasis supplied).

Consequently, we find Commerce's interpretation that the statutory countervailing duty provisions are applicable to imports of LEU under both EUP purchase contracts and SWU enrichment contracts reasonable.

There remains the question whether purchases of enrichment services for more than adequate remuneration may constitute countervailable subsidies. Title 19 U.S.C. § 1677(5)(E)(iv) provides that a subsidy which confers a benefit exists "in the case where goods or services are provided, if such goods or services are

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constructed export price in order to assess a dumping margin, does not apply in the countervailing duty context. Consequently, for purposes of the countervailing duty determination, the tolling regulation does not prohibit recognition of a subcontractor or toll manufacturer as a producer of a good. Thus, the tolling regulation does not contradict the conclusion that the enrichers are "producers" of LEU for purposes of a countervailing duty determination.

provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration." Thus, while the statute explicitly provides a remedy for the provision of subsidies in the form of goods or services, it also explicitly limits purchases that may constitute subsidies to purchases of "goods." 19 U.S.C. § 1677(5)(E)(iv).

As in its original determinations, Commerce concludes in the Remand Determination that the state-owned French electric utility, EdF, purchased a good from and provided a subsidy to the French enricher Eurodif. *See* Remand Determ. at 86; *see also Low Enriched Uranium from France*, 66 Fed.Reg. 65,901, 65,902 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determination); Dep't of Commerce Mem. from Bernard T. Carreau to Faryar Shirzad, *Issues and Decision Memorandum: Final Affirmative Countervailing Duty Determination: Low Enriched Uranium from France—Calendar Year 1999* at 3-5 (Dec. 21, 2001) (unpublished), *at www.ia.ita.doc.gov/frn/index.html.* Commerce first bases this conclusion on its finding that SWU transactions constitute sales of LEU, because the enricher obtains ownership of the LEU and transfers ownership to the utility for consideration. *See* Remand Determ. at 86-87. As discussed above, the Court has found this conclusion incorrect. *See supra* pp. 11-12.

Commerce also states, however, that even if the SWU transactions do not constitute sales of merchandise,

*Appendix H*

EdF's purchase of enrichment from Eurodif still constitutes a countervailable subsidy. The agency argues that "[f]irst, there is no question that EdF obtains LEU in a series of purchase transactions (*i.e.*, the purchase of natural uranium, the purchase of conversion, and the purchase of enrichment)." *Id.* at 87. Accordingly, Commerce argues, EdF's "payment of more than adequate remuneration to Eurodif is made in connection with the major step in the process by which EdF is 'purchasing goods.'" *Id.* Second, Commerce argues that

> the fundamental purpose of the [countervailing duties] provision is to address subsidization of manufacturing operations that produce subject merchandise. In this context, the purchase of manufacturing or processing is a necessary component of the good. As a practical matter, goods include any manufacturing or processing that is necessary to produce the article. Thus, the sale of manufacturing or processing, which is a necessary component of the good, pertains to the purchase of goods, and does not constitute the purchase of a "service" in this context.

Remand Determ. at 87.

We find Commerce's first argument unpersuasive. We have found that the enrichment transaction here does not constitute a sale of subject merchandise, and the mere fact that enrichment is "purchased" as part of a series of transactions in the nuclear fuel production

process simply does not constitute a basis for concluding that the purchase of enrichment processing is tantamount to the purchase of a good. Moreover, it appears from the record that under SWU contracts, Eurodif performs only the enrichment portion of the nuclear fuel production process. Commerce stated in its preliminary countervailing duty determination that "[f]or purposes of this determination, we accept Eurodif's assertion that its operations are no different from those of USEC." *Low Enriched Uranium from France*, 66 Fed.Reg. 24,325, 24,327 (Dep't Commerce May 14, 2001) (notice of preliminary affirmative countervailing duty determination and alignment with final antidumping duty determination). If, under SWU contracts, Eurodif performs only the uranium enrichment, then EdF must contract with third parties for the other steps in the production of nuclear fuel, including procuring feed uranium and fabricating LEU into nuclear fuel rods. *See supra* note 3 (listing the five steps in the production of nuclear fuel). The fact that the utility contracts with third parties, rather than with the enricher, to complete four of the five steps in the nuclear fuel production process renders even less plausible the claim that enrichment is merely part of an overall goods transaction between the utility and enricher.

Commerce's second argument posits that operations resulting in or leading to the production of a good do not constitute "services" for the purpose of the countervailing duty statute. Remand Determ. at 87 ("[T]he sale of manufacturing or processing, which is a

necessary component of the good, pertains to the purchase of goods, and does not constitute the purchase of a 'service' in this context."). The agency bases this conclusion on its understanding that "the fundamental purpose of the [statutory countervailing duties] provision is to address subsidization of manufacturing operations that produce subject merchandise." *Id.*

The countervailing duty provisions are "intended to offset any unfair competitive advantage enjoyed by foreign manufacturers or exporters over domestic producers as a result of subsidies." S.Rep. No. 103-412, at 88 (1994). To realize this legislative intent, Commerce interprets the countervailing duty statute to reach subsidies that help to defray the costs of manufacturing subject merchandise. Noting that the statute does not define "service," the agency distinguishes manufacturing services, or operations that result in the production of a good, from other types of services which do not result in the production of a good. *See* Remand Determ. at 87-88 ("The term 'service' is not defined in the statute. Under its ordinary meaning, consistent with the purpose of [19 U.S.C. § 1677(5)(D) ], we interpret the term to mean '[t]he sector of the economy that supplies the needs of the consumer but produces no tangible goods, as banking and tourism.' ") (internal citation omitted). Under this interpretation, the agency concludes that even transactions "solely for contract manufacturing" are covered by 19 U.S.C. § 1677(5)(D), because the

manufacturing operations lead to the production of a good. Remand Determ. at 88. Essentially, Commerce states that because manufacturing operations are integral to the good produced, subsidization of those operations constitutes subsidization of the good itself. *See id.* at 89.

Commerce's distinction between manufacturing processes that lead to the production of subject merchandise and other services that do not produce tangible goods is consistent with the language and purpose of the countervailing duty statute. It is consistent with the statute's language because it preserves a real distinction between "goods" and "services." It is consistent with the statute's purpose because subsidization of a process essential to the manufacture of a good lowers the manufacturer's cost of producing that good, which may enable the manufacturer to gain a competitive advantage over an unsubsidized competitor.

In the case of enrichment processing, subsidization would lower an enricher's production costs, enabling the enricher to sell enrichment processing at lower prices than an unsubsidized enricher. This is the type of "unfair competitive advantage" the statute is intended to counter, and therefore, Commerce's interpretation of the statute is reasonable and in accordance with law.

Consequently, we affirm Commerce's determination that purchase of enrichment for more than adequate remuneration may constitute a countervailable subsidy.

**Conclusion**

In summary, we find Commerce's explanation of its industry support determination is in accordance with law, and we sustain this portion of the Remand Determination. We also sustain Commerce's determination that the countervailing duty law may apply to imports of LEU under either LEU purchase contracts or SWU enrichment contracts, as well as the agency's determination that the purchase of enrichment for more than adequate remuneration may constitute a countervailable subsidy. Because this opinion is limited to general issues, *see* Scheduling Order at 4-5 (Aug. 5, 2002), we do not decide here the question whether the LEU imported from the subject countries benefitted from countervailable subsidies.

We also find Commerce's determinations that LEU and SWU contracts are equivalent and that the antidumping provisions are applicable to SWU transactions are neither supported by substantial evidence nor in accordance with law. Accordingly, with respect to these conclusions, we find that Commerce's Remand Determination is unlawful and we reverse.

*Appendix H*

The parties are ordered to consult with each other and with the Clerk of the Court and to file a revised scheduling order within sixty days of the date of entry of this opinion.

## APPENDIX I — OPINION AND ORDER OF THE UNITED STATES COURT OF INTERNATIONAL TRADE DECIDED DECEMBER 22, 2003

## UNITED STATES COURT OF INTERNATIONAL TRADE

Slip Op. 03-170

Court No. 02-00112; and Court Nos. 02-00113, 02-00114, and Consol. Court Nos. 02-00219; 02-00221, 02-00227, 02-00229, and 02-00233

USEC INC. and UNITED STATES ENRICHMENT CORPORATION,

Plaintiffs,

v.

UNITED STATES,

Defendant.

Decided: December 22, 2003

[Motions for permission for interlocutory appeal pursuant to 28 U.S.C. § 1292(d) granted.]

Before: Pogue, Wallach, and Eaton, Judges

*Appendix I*

## Opinion and Order

**Pogue, Judge:** In two prior opinions, this Court decided four issues that critically affect the future of this litigation. The parties now seek permission for an immediate interlocutory appeal of the Court's decisions. *See* 28 U.S.C. § 1292(d) (2000). For the following reasons, we will grant the parties' requests.

## Background

The Court's two prior opinions in this matter arose from fifteen actions, consolidated under nine[1] court numbers, all challenging aspects of the final affirmative antidumping and countervailing duty determinations of the Department of Commerce ("the Department" or "Commerce") with regard to low enriched uranium ("low enriched uranium" or "LEU") from France, Germany, the Netherlands, and the United Kingdom[2] or the related

1. Only eight of those court numbers are contained in the heading of this order. Court Nos. 02-00220 and 02-00236, consolidated as Court No. 02-00220, involve specific issues which await resolution of the "general" issues presented here for certification. *See* Scheduling Order (Aug. 2, 2002); *see also infra* n.3.

2. The determinations challenged in the original actions were *Low Enriched Uranium from France*, 67 Fed.Reg. 6,680 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination of sales at less than fair value and antidumping duty order); *Low Enriched Uranium from France*, 66 Fed.Reg. 65,877 (Dep't Commerce Dec. 21, 2001) (notice of final

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final injury determination of the International Trade Commission ("ITC").[3] This Court remanded aspects of the Department's determinations in *USEC Inc. v. United States*, 27 CIT __, 259 F.Supp.2d 1310 (2003) ("*USEC I*").[4] In *USEC Inc. v. United States*, 27 CIT __, 281

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determination of sales at less than fair value) ("*LEU from France*"); *Low Enriched Uranium from France*, 67 Fed.Reg. 6,689 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination and notice of countervailing duty order); *Low Enriched Uranium from France*, 66 Fed.Reg. 65,901 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determination); *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 67 Fed.Reg. 6,688 (Dep't Commerce Feb. 13, 2002) (notice of amended final determinations and notice of countervailing duty orders); *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 66 Fed.Reg. 65,903 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determinations).

3. *Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom*, 67 Fed.Reg. 6,050 (ITC Feb. 8, 2002). The parties' challenges to the ITC's determinations are consolidated as Court No. 02-00220.

4. In the Court's original Scheduling Order for this matter, we decided, and the parties agreed, to address initially "general issues" affecting the Department's threshold determinations, to be followed later by issues which are not general, such as "challenges to the Department of Commerce's calculation results and methods." Scheduling Order at 5 (Aug. 2, 2002). The cases in which these "general issues" were before the Court were assigned to the current panel. *See* USCIT R. 77(e)(2) ("An action

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F.Supp.2d 1334 (2003) ("*USEC II*"), the Court reviewed the remand results, affirming-in-part and reversing-in-part the Department's remand determination.[5]

No party requests a further remand of the general issues decided by the Court in *USEC I* and *USEC II*. Rather, the parties now seek a statement pursuant to 28 U.S.C. § 1292(d) permitting immediate appeal.[6]

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may be assigned to a three-judge panel . . . when the chief judge finds that the action raises an issue . . . [that] has broad or significant implications in the administration or interpretation of the law."). Familiarity with the Court's prior opinions is presumed.

5. In reviewing the agency record in either an antidumping or countervailing duty case, "the [C]ourt [of International Trade] *shall hold unlawful* any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (emphasis added). *See also* 28 U.S.C. § 1585 ("The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States."). Under these statutes, this Court has both the authority and the duty to make this final determination after remand. To hold otherwise would be both inconsistent with the statute and destructive of the need for finality in litigation before the Court. *Cf. Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379 (Fed.Cir.2003) (holding that the CIT abused its discretion by "interposing its own [factual] determinations" rather than remanding to the ITC for further fact-finding, where fact-finding was committed to the agency by statute).

6. In their motions, the parties do not entirely agree on the proposed statement of the issues for appeal. The United States states the issue as:
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Whether the United States Department of Commerce's determination that the foreign enricher is the appropriate respondent, in antidumping duty proceedings, for determining export price and constructed export price of Low Enriched Uranium imported pursuant to enrichment transactions is supported by substantial evidence and otherwise in accordance with law.

Def.'s Mot. Stat. Pursuant to 28 U.S.C. § 1292(d)(1) at 3.

Plaintiffs and Defendant-Intervenors EURODIF S.A.Compagnie Generale Des Matieres Nucleaires and COGEMA, Inc. (collectively, "COGEMA"), USEC Inc. and the United States Enrichment Corporation (collectively, "USEC"), and Intervenor the Ad Hoc Utilities Group ("AHUG") state the issues as the Court's decisions on the general issues regarding:

1. The Department of Commerce's determination that the antidumping duty petitions and the countervailing duty petitions leading to the contested determinations were filed on behalf of the U.S. low enriched uranium ("LEU") industry;

2. The Department of Commerce's determination that the antidumping duty law is applicable to LEU delivered pursuant to enrichment transactions; and

3. The Department of Commerce's determination that the countervailing duty law is applicable to LEU delivered pursuant to enrichment transactions, and that a countervailable subsidy determination can be based on finding that prices paid pursuant to enrichment transactions have been for more than adequate remuneration. (Cont'd)

Jurisdiction lies under 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2000).

## The Issues

In *USEC I* and *USEC II*, the Court determined that the key general issues decided by the Department in this matter involved the initial applicability of the Department's "tolling" regulation, 19 C.F.R. § 351.401(h).[7] Specifically, the Court decided the following four issues:

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COGEMA's, USEC's, and AHUG's Mot. Issuance Interlocutory Order at 2.

We attempt to resolve this disagreement by stating our view of the issues decided by the Court. *See infra* pp. 5-6.

In addition, the government's "Motion for a Statement Pursuant to 28 U.S.C. § 1292(d)(1)" contains a proposed order certifying a question for appeal. Def.'s Mot. Stat. Pursuant to 28 U.S.C. § 1292(d)(1). Conversely, the government, in replying to COGEMA's, USEC's, and AHUG's Motion also "request[s] that the Court decline to certify any issues for interlocutory appeal." Def.'s Resp. to Pl .'s Mot. Issuance Interlocutory Order at 3. The government's filings do not explain this discrepancy.

7. Title 19 C.F.R. § 351.401(h) states that Commerce "will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product." 19 C.F.R. § 351.401(h).

*Appendix 1*

1. On the record here, the Department's decision that the enrichment of uranium feedstock pursuant to "SWU"[8] contracts constitutes a sale, rather than a subcontracting (or "tolling") arrangement, is unsupported by substantial evidence;

2. On the record here, the Department's decision not to apply its tolling regulation to determine whether the Intervenors (the "utilities," also the "Ad Hoc Utilities Group" or "AHUG"), rather than the "enrichers," should be designated as producers of LEU is not in accordance with law;

3. On the record here, the Department's reasons for declining to apply the tolling regulation in the context of its industry support determination, and thus, its application of a different definition of "producer" from that used in establishing export or constructed export price are reasonable and therefore in accordance with law; and

4. On the record here, the Department's interpretation that the statutory countervailing duty provisions reach subsidies that help to defray the costs

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8. A SWU contract is a contract for a "separative work unit," a measurement of the amount of energy or effort required to separate a given quantity of feed uranium into LEU and depleted uranium at specified assays. *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1314; *LEU from France*, 66 Fed.Reg. at 65,884. Under a SWU contract, a utility purchases separative work units and delivers a quantity of feed uranium to the enricher. *USEC I*, 27 CIT at __, 259 F.Supp.2d 1310, 1314.

of manufacturing imports of LEU is reasonable, and accordingly, the Department's determination that the purchase of enrichment for more than adequate remuneration may constitute a countervailable subsidy is in accordance with law.

We now consider the parties' motions.

**Discussion**

Title 28 U.S.C. § 1292(d) permits interlocutory appeals, but only where "a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and [where] an immediate appeal . . . may materially advance the ultimate termination of the litigation." *Id.* The instant case meets each part of this statutory three-prong test.

First, general issues one and two involve controlling questions of law because, absent further remand, these two issues effectively terminate the country-specific antidumping cases at issue here. Conversely, the decisions on general issues three and four involve controlling questions of law because those decisions permit cases to proceed that would otherwise have been remanded or concluded. Moreover, further proceedings in this Court will not moot these issues, and an incorrect disposition of these issues will require reversal of a final judgment based thereon. *See* 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3930, at 423-24 (2d ed. 1996) ("There is no doubt that a question is

'controlling' if its incorrect disposition would require reversal of a final judgment. . . .").

Second, this is a case of first impression, in an area where the law is complex, and there is undeniably a substantial difference of opinion on each question.

Third, an immediate appeal may materially advance the ultimate termination of this litigation. The four issues decided by the Court define the scope and effect of the remaining questions which may be raised in the underlying fifteen actions, and which remain to be considered. Consequently, the Court's decision on these four issues sets the course for any further proceedings. Absent an immediate appeal, the parties and this Court will spend substantial resources and time on the remaining proceedings before a final appealable judgment can be made. On the other hand, an immediate appeal will significantly expedite proceedings by clarifying the course of the proceedings and enabling the parties and the Court to allocate resources efficiently. Accordingly, the Court finds that the three-prong test set forth in 28 U.S.C. § 1292(d) is satisfied here.

**Conclusion**

In the circumstances present here, an immediate interlocutory appeal will best serve the interests of all parties and of the judiciary. Therefore, the Court will certify, for intermediate interlocutory appeal, the Court's decision on the four general issues decided in *USEC I* and *USEC II*.

**THEREFORE**, this action having been duly submitted for decision, and the Court, after due deliberation having rendered a decision upon the issues identified, and no party having sought further remand of the Court's decision, and the Court having determined that these issues involve controlling questions of law with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from this Court's decision may materially advance the ultimate termination of this litigation; now, in conformity with that decision, it is hereby

**ORDERED** that

1. On the record here, the Department's decision that the enrichment of uranium feedstock pursuant to SWU contracts constitutes a sale, rather than a subcontracting (or "tolling") arrangement, is unsupported by substantial evidence;

2. On the record here, the Department's decision not to apply its tolling regulation to determine whether the intervenors (the "utilities," also the "Ad Hoc Utilities Group" or "AHUG"), rather than the "enrichers," should be designated as producers of LEU is not in accordance with law;

3. On the record here, the Department's reasons for declining to apply the tolling regulation in the context of its industry support determination, and thus, its application of a different definition of "producer" from that used in establishing export or constructed export

price are reasonable and therefore in accordance with law; and

4. On the record here, the Department's interpretation that the statutory countervailing duty provisions reach subsidies that help to defray the costs of manufacturing imports of LEU is reasonable, and, accordingly, the Department's determination that the purchase of enrichment for more than adequate remuneration may constitute a countervailable subsidy is in accordance with law; and it is further

**ORDERED** that the Court finds, pursuant to 28 U.S.C. § 1292(d), that the Court's decision on the four issues stated above involve controlling questions of law with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from the Court's decision may materially advance the ultimate termination of this litigation; and it is further

**ORDERED** that 28 U.S.C. § 1292(d) hereby permits appeal of these issues.

Donald C. Pogue
Judge

Evan J. Wallach
Judge

Richard K. Eaton
Judge

Dated: December 22, 2003
New York, New York

## APPENDIX J — ORDER FOR REMAND OF THE UNITED STATES COURT OF INTERNATIONAL TRADE DECIDED JANUARY 5, 2006

**UNITED STATES COURT OF INTERNATIONAL TRADE**

Court No. 02-00219.

EURODIF S.A., COMPAGNIE GÉNÉRALE DES MATIÉRES NUCLÉAIRES, AND COGEMA, INC., ET AL.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

Jan. 5, 2006, Decided

POGUE, Judge

**ORDER FOR REMAND**

In accordance with the decisions of the United States Court of Appeals for the Federal Circuit in *Eurodif S.A. v. United States*, 411 F.3d 1355(Fed.Cir.2005) (*"Eurodif I"*) and *Eurodif S.A. v. United States*, 423 F.3d 1275

(Fed.Cir.2005) (*"Eurodif II"*), and upon consideration of the parties' filings herein, it is hereby:

**ORDERED** that the final determination and issuance of an antidumping duty order by the United States Department of Commerce ("Commerce") in *Low Enriched Uranium from France*, 66 Fed.Reg. 65,877 (Dep't Commerce Dec. 21, 2001)(notice of final affirmative antidumping duty determination) *as amended*, 66 Fed.Reg. 6680 (Dep't Commerce Feb. 13, 2002)(notice of amended final determination of antidumping duty order), challenged in Consolidated Court No. 02-00219, is remanded to Commerce for action consistent with the decisions of the Court of Appeals for the Federal Circuit in *Eurodif I* and *II*.

**ORDERED** that Commerce upon remand shall revise such final determination and order in accordance with the decisions in *Eurodif I* and *Eurodif II*. Commerce shall specifically explain how its final determination and order on remand has eliminated all SWU transactions as required by *Eurodif I* and *II*.

**ORDERED** that Commerce shall file its remand results in Consolidated Court No. 02-00219 with the Court, and serve the parties with same, by **March 3, 2006**. All parties may file and serve responses thereto by **March 17, 2006** thereafter. All parties may file and serve a reply to any responses by **March 31, 2006**; and it is further

**ORDERED** that all other action in Consolidated Court No. 02-00219 before this Court is stayed pending further notice from the Court.

## APPENDIX K — FINAL RESULTS OF REDETERMINATION BY THE DEPARTMENT OF COMMERCE DATED MARCH 3, 2006

Low Enriched Uranium from France
Final Results of Redetermination
Pursuant to Court Remand
*Eurodif S.A., et al. v. United States*
Consol. Ct. No. 02-00219, Slip Op. 06-2
(January 5, 2006 CIT)

### SUMMARY

On January 5, 2006, the U.S. Court of International Trade (CIT) remanded the above-referenced proceeding to the Department of Commerce (Commerce) to revise the final determination (amended) and order in this proceeding in accordance with *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005) (*Eurodif I*) and *Eurodif S.A. v. United States*, 423 F.3d 1275 (Fed. Cir. 2005) (Eurodif II). Furthermore, the CIT specifically directed the Department to "explain how its final determination and order on remand has eliminated all SWU transactions as required by *Eurodif I* and *II*." Slip Op. 06-2, at 2.

For these final remand results, we have recalculated the margin for the affiliated respondents in the investigation, Eurodif S.A., Compagnie Generale Des Matieres Nucleaires, and Cogema, Inc. (collectively, Eurodif), excluding all Eurodif sales made pursuant to separative work units (SWU) contracts, thus fulfilling the CIT mandate. As a result, Eurodif's dumping margin is now 23.66 percent and the antidumping duty order will remain in place.

*Appendix K*

## BACKGROUND

On February 6, 2002, Commerce issued an antidumping duty (AD) order on low enriched uranium (LEU) from France. Respondents challenged the determination (and a concurrent countervailing duty determination) arguing that the transactions which involved the enrichment of the uranium (so-called SWU contracts) did not constitute sales of goods, but rather should have been considered service transactions which are not subject to AD law. The CIT ruled against Commerce, and the case was appealed to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in *Eurodif I*. The Federal Circuit ruled that SWU contracts constitute sales of enrichment services, not goods, and, therefore, that LEU imported pursuant to SWU contracts was not subject to the AD law. The Federal Circuit based its ruling on *Florida Power & Light v. United States*,[1] despite the fact that a different statute with different purposes was at issue. While the Department continues to believe that SWU contracts result in the sale of LEU by French producers/exporters to U.S. customers, consistent with the Court's specific remand instructions, we have removed all sales made pursuant to SWU contracts from the calculations of this redetermination. We will review the possibility of seeking *certiorari* after final judgement has been rendered in this matter.

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1. 307 F.3d 1364 (Fed. Cir. 2002) (accepting the Department of Energy's argument that, under the Contracts Disputes Act, its SWU contracts constituted purchases of services).

*Appendix K*

On January 18, 2006, and January 27, 2006, we received comments from USEC Inc. and United States Enrichment Corporation (collectively, USEC), the U.S. producer of LEU, concerning this remand proceeding. Eurodif submitted comments on January 23, 2006, and January 30, 2006.

On February 7, 2006, we issued draft remand results. On February 13, 2006, we received comments on the draft remand results from Eurodif, USEC, and the Ad Hoc Utilities Group (AHUG). The Department's response to the parties' comments is included in the "Comments" section, below. The Department has not made any changes from the draft remand results.

**REMAND ANALYSIS OF SWU TRANSACTIONS**

On page 8 of their May 1, 2001, questionnaire response, respondents state that they have "reported 'SWU' for sales of enrichment services, and 'LEU' for sales of enriched uranium," and the databases of sales provided with the questionnaire response contained a field which so identified all reported sales. After removing all SWU sales, we recalculated Eurodif's margin on the sales of LEU. The resulting dumping margin for Eurodif is 23.66 percent, compared to 19.95 percent in the original order. *See Memorandum to Dana Mermelstein from Mark Hoadley, Remand Analysis of French Low Enriched Uranium* (February 7, 2006) for the details of how the calculations and programming changed, and for the revised dumping margins. Because Eurodif's rate is the basis for the "all others" rate, the all others' rate is now 23.66 percent as well.

*Appendix K*

## COMMENTS

*Comment 1*: USEC commented that the Department should have sought additional, transaction-specific information regarding the sales under investigation, as USEC proposed in its earlier comments. According to USEC, such information might have demonstrated that certain transactions made pursuant to SWU contracts were for purchases of goods, and were not service transactions "as understood by" the Federal Circuit in *Eurodif I* and *II*.

*Commerce's Position*: As stated above, while the Department continues to believe that SWU contracts result in the sale of LEU by French producers/exporters to U.S. customers, the CIT's specific remand instructions require the Department to remove sales made pursuant to SWU contracts. The CIT's instructions do not allow for a transaction-by-transaction analysis of each SWU contract or of the broader context of each sale made under these contracts.

*Comment 2*: Eurodif and AHUG argue the Department must revise the scope of the order to exclude SWU transactions. Eurodif proposes the addition of the following sentence to the scope of the order: "Also excluded from this order is LEU from France imported into the United States for the fulfillment of SWU contracts, provided that any such import is accompanied by the importer's certification to that effect."

*Appendix K*

USEC claims the scope of an antidumping order is a matter of physical characteristics, and not the nature of sales transactions. Because the LEU entered into the United States unquestionably fits the physical description of the subject merchandise, regardless of whether pursuant to so called "SWU" or "LEU" transactions, argues USEC, the nature of the sales transaction is irrelevant to the scope of the order, and instead pertains to the issue of assessment. USEC argues that all LEU entries are reviewable under the order, but that if the Department were to determine that a sale is not involved in an administrative review (in accordance with *Eurodif I* and *II*), it would simply not order assessment of duties for those entries in order to comply with the courts' decisions. Furthermore, argues USEC, the certification proposed by Eurodif is inadequate, and only an analysis of each contract can determine whether each entry is a sale subject to antidumping law.

*Commerce's Position*: We agree with USEC that the scope of the order should not be revised in order to address the *Eurodif I* and *Eurodif II* decisions by the Federal Circuit. The term subject merchandise is defined as the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order or a finding. *See* Section 771(25) of the Tariff Act of 1930, as amended. LEU imported into the United States for consumption that meets the description of the merchandise established in the AD order on LEU continues to be subject merchandise. However, pursuant to the *Eurodif I* and *II* decisions,

Commerce will not assess AD duties on imports of LEU sold under SWU transactions. Whether a sale is excludable on the ground that it constitutes a SWU sale is a question that must be determined in the context of an administrative review by the administering authority analyzing the terms and conditions of the contract, and the parties' performance of such contracts. If the contract in question is determined to be a SWU transaction, consistent with *Eurodif I* and *Eurodif II*, Commerce will not include the SWU price in its dumping margin calculation. Based upon the above, Commerce has not revised the scope of the AD order on LEU.

*Comment 3*: AHUG states that it is disturbed by Commerce's assertion that it disagrees with the Federal Circuit's decision and is contemplating petitioning the Supreme Court for *certiorari*, despite having contemplated (as evidenced by Commerce's requests for extensions of time, it argues) and bypassed the opportunity to seek *certiorari* after the Federal Circuit issued its rehearing decision on September 9, 2005. AHUG argues that the approach being contemplated by Commerce is inconsistent with the objective of the interlocutory appeal process and interjects unnecessary uncertainty into the nuclear fuel market.

*Commerce's Position*: Commerce's decision concerning a petition for *certiorari* is not relevant to whether our draft redetermination properly fulfills the instructions of the CIT. We disagree with AHUG that Commerce, by leaving open the option of seeking *certiorari*, has acted in a manner inconsistent with the interlocutory appeal

process. As stated above, while Commerce has respectfully complied with the CIT's order, the United States continues to believe that the decisions of the Federal Circuit in *Eurodif I* and *II* are erroneous, and will review the possibility of seeking certiorari after final judgment has been rendered in this matter.

**FINAL RESULTS OF REDETERMINATION**

For these final results pursuant to the CIT remand, the recalculated weighted-average margins are as follows:

| Company | Final Determination and Order | Final Results of Redetermination Pursuant to Remand |
|---|---|---|
| Eurodif S.A., Compagnie Generale Des Matieres Nucleaires, and Cogema, Inc. | 19.95% | 23.66% |
| All Others | 19.95% | 23.66% |

s/ David M. Spooner
David M. Spooner
Assistant Secretary
for Import Administration

3/3/06
(Date)

## APPENDIX L — OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE DECIDED MAY 18, 2006

## UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 02-00219

EURODIF S.A., COMPAGNIE GÉNÉRALE DES MATIÈRES NUCLÉAIRES AND COGEMA, INC., ET.AL.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

May 18, 2006, Decided

**JUDGES:** Before: Donald C. Pogue, Evan J. Wallach, and Richard K. Eaton, Judges

**OPINION**

**Per Curiam:** This matter arises after remand pursuant to *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed.Cir.2005) ("*Eurodif I* ") and *Eurodif S.A. v. United States*, 423 F.3d 1275 (Fed.Cir.2005) ("*Eurodif II*"). In accordance with these decisions, we ordered "that

Commerce upon remand shall revise such final determination and *order* in accordance with the decisions in *Eurodif I* and *Eurodif II*. Commerce shall specifically explain how its final determination *and order on remand has eliminated all SWU transactions* as required by *Eurodif I and Eurodif II*." *Eurodif S.A. v. United States*, 414 F.Supp.2d 1263, 1263, 30 CIT __, __ (2006) (emphasis added) ("*Eurodif III*").

In totality, Commerce in its Final Results of Redetermination Pursuant to Court Remand, recalculated the duty margin by excluding *all* low enriched uranium ("LEU") covered by separative work unit ("SWU") contracts from its margin calculation. *See* Low Enriched Uranium from France: Final Results of Redetermination Pursuant to Court Remand, Consol. Ct. No. 02-00219, Slip Op. 06-02 (January 5, 2006 CIT) at 3 ("Remand Redetermination"). Despite the contrary holdings of *Eurodif I* and *Eurodif II* and the specific instructions of this court, however, Commerce concluded that it will not modify the scope of the antidumping duty order to exclude LEU covered by SWU contracts. *Id.* at 4-5.

Responding to Commerce's conclusion, Eurodif S.A., Cogema, and Cogema, Inc. (collectively "Eurodif") claim that Commerce erred in its Remand Redetermination. Eurodif claims that any LEU covered by SWU contracts should be excluded from the scope of the antidumping duty order. As such, Eurodif asks the court to direct Commerce to amend to:

(1) Liquidate all entries without antidumping duties on LEU imported to fulfill SWU contracts (and therefore refund cash deposits already tendered on such entries);

(2) exclude LEU imported to fulfill SWU contracts from the scope of the order;

(3) cease the suspension of liquidation and any deposit requirement on such entries.

Eurodif's Comments re: Commerce's Final Results of Redetermination Pursuant to Ct. Remand at 13.

Alternatively, Defendent-Intervenors, USEC Inc. and United States Enrichment Corporation (collectively "USEC"), argue that Commerce excluded too many goods from the margin calculation through its failure to investigate the facts behind the SWU contracts. *See* Resp. USEC Inc. & U.S. Enrichment Corp. Final Results of Redetermination Pursuant to Ct. Remand at 3-8 ("USEC's Resp."). Specifically, USEC argues that although the SWU contracts may facially suggest that they cover the provision of services, in fact, in some instances, the title over the uranium used in the process transfers during the transaction, making that transaction a sale of goods. By failing to undertake this investigation, USEC avers, Commerce impermissibly excluded non-service oriented transactions. *Id.* at 4-6. Additionally, USEC argues that Commerce failed to consider whether Cogema and suppliers of uranium ores were affiliated

and, thereby, improperly excluded certain LEU covered by SWU contracts from the dumping margin. *Id.* at 6-8.

We will address each issue.[1]

**(1) Failure to re-open the record to investigate the facts behind SWU transactions:**

USEC claims that although the contracts in question might be read as service contracts, in some instances, the transactions may really entail the sale of goods under the test enunciated in *Eurodif I* and *II*. *See id.* at 4-6. USEC argues that some transactions involve the enricher's client providing certain feed uranium and receiving from the enricher LEU not made from the uranium the client supplied. *Id.*[2] Under such an

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1. USEC raised methodological issues in its Compliant for which this court reserved judgment. In its papers filed in conjunction with Commerce's Remand Redetermination, USEC has advised the court that it waives these arguments. USEC Resp. at 8. Similarly, Eurodif amended its complaint to withdraw any issues for which this court has reserved judgment. Eurodif's Amendment of Compl. by Consent, April 27, 2007.

2. For example, under USEC's theory, if a person took his or her Hummer® to the carwash and received *a different* (albeit clean) Hummer® back such a transaction would involve the sale of goods, *i.e.*, a new Hummer®. The Hummer® the client initially provides would merely constitute part of the consideration for the new Hummer®. To address such factual circumstances, USEC proposes a test for differentiating those transactions involving the provision of services from those providing the sale

(Cont'd)

arrangement, USEC asserts, title over the feed uranium supplied by the client must transfer to the enrichers, and title over the enricher's uranium (which the client receives back) must revert to the client. Therefore, USEC claims, such arrangements would constitute a sale of goods under the Federal Circuit's *Eurodif I* and *II*.

In its Remand Redetermination, Commerce found that our remand instructions did "not allow for a transaction-by-transaction analysis of each SWU contract or of the broader context of each sale made under these contracts." Remand Redetermination at 3. Rather, Commerce concluded that our order required the exclusion of all LEU covered by SWU contracts regardless of any other factors parties raised regarding the enriching transactions covered by SWU contracts. Therefore, Commerce declined to reopen the record in order to investigate USEC's allegations. *Id.*

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(Cont'd)

of goods. It appears that under this test, presumptively SWU contracts will be treated as contracts for the provision of services. This presumption however, could be overcome in instances where (1) "contracts which provide for utilities to deliver natural uranium in less time than necessary to cover the average production and delivery time for LEU imply transactions in which the enricher owns the LEU during the enrichment process" or (2) "the short natural uranium delivery lead time in such contract implies that the enricher effectively conveyed ownership of natural uranium used in the enrichment to the utility when production began." USEC Comments at 4.

We agree with Commerce. The Federal Circuit held in *Eurodif II* that the "inescapable conclusion flowing from [the circumstances present] is that the enrichers do not 'sell' LEU to utilities pursuant to the SWU contracts at issue here." *Eurodif II*, 423 F.3d at 1278. In so holding, *Eurodif II* reaffirmed *Eurodif I's* holding that under "the contracts in this case, it is clear that ownership of either the unenriched uranium or the LEU is not meant to be vested in the enricher during the relevant time periods that the uranium is being enriched." *Id.* (quoting *Eurodif I*, 411 F.3d at 1362). Both *Eurodif I* and *Eurodif II* found that this conclusion was not altered by factual circumstances operating behind the individual contracts at issue here. Significantly, in specifically rejecting the argument USEC raises here, *Eurodif II* held that "[w]hile it is correct that a utility may not receive the LEU that was enriched from the exact unenriched uranium that it delivered to the enricher, it is nevertheless true that up until the sampling and weighing of the LEU before delivery, the utility retains title to the quantity of unenriched uranium that is supplie[d] to the enricher." *Id.* (quoting *Eurodif I*, 411 F.3d at 1362).

Accordingly, the Federal Circuit has already considered this issue and held that the facts/arguments USEC raises in this respect are of no moment. Thus, Commerce's Remand Redetermination on this issue is sustained.

**(2) Affiliated Party Feed Purchase Claim**

Next, USEC contends that "Commerce's approach failed to examine whether a given SWU transaction in which the natural uranium was supplied by Cogema—a respondent in this case—or an affiliate thereof should be treated as a sale of merchandise." USEC's Resp. at 6. Commerce did not squarely address this issue apparently finding that the remand instructions did not direct it reopen the record on this question.

Commerce is correct. Nothing in this court's remand order pertained to this question. In our original decision *USEC Inc. v. United States*, 27 CIT __, __, 259 F.Supp.2d 1310, 1316 n. 4 (2003), we specifically noted that the record did not indicate that such an affiliation was relevant to Commerce's decision. Commerce chose not to pursue this analysis. *See* Final Remand Determination for *USEC Inc. And United States Enrichment Corporation v. United States*, Court Nos. 02-00112, 02-00113, 02-00114, and Consol. Court Nos. 02-00219, 02-0000221, 02-00227, 02-00229, and 02-00233 Slip. Op. 03-34, (March 25, 2003) at 60. As such, Commerce's Remand Determination now before the court is sustained on this issue.

**(3) Scope of the Order**

Last, Eurodif argues that we should remand with instructions for Commerce to modify the scope of the antidumping order to exclude LEU covered by SWU contracts. Commerce and USEC concede, as they must,

that when the court finds that the scope of an order improperly extends to certain goods, Commerce must ordinarily revise the antidumping duty order to exclude such goods. Nevertheless, both argue that the order's scope is proper here. Directing the court to 19 U.S.C. § 1677(25), Commerce argues that " 'subject merchandise' means the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, [or] an order under this subtitle. . . ." Because all LEU imported is of the "class or kind of merchandise . . . within the scope of an . . . order," Commerce claims, all LEU must fall within the order. Commerce admits that certain LEU may be excluded from antidumping duties by virtue of the Federal Circuit's holdings in *Eurodif I* and *II*. Nonetheless, Commerce claims that those goods are only excludable on the basis of the non-physical features, *i.e.*, that they are covered under SWU contracts. *See, e.g.*, Def.'s Resp. Parties Remand Cmts. 6-7; *cf.* Remand Redetermination at 5.[3] Non-physical features,

3. Commerce's Remand Redetermination offered minimal justification for declining to modify the scope of its antidumping order. In its entirety, Commerce wrote:

> We agree with USEC that the scope of the order should not be revised in order to address the *Eurodif I* and *Eurodif II* decisions by the Federal Circuit. The term subject merchandise is defined as a class ~~or~~ kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, and order or a finding. *See* Section 771(25) of the Tariff Act of 1930, as amended. LEU imported into the

(Cont'd)

Commerce contends, are not a basis for distinguishing goods from the "class or kind of merchandise" subject to the antidumping duty order. Consequently, Commerce concludes that the adjustments *Eurodif I* and *Eurodif II* require may only be made in an administrative review rather than through modifying the antidumping duty order.

The first flaw with Commerce's argument is that it is circular—LEU produced under SWU contracts are only of the "class or kind of merchandise" covered by the order if Commerce does not modify the order's definition of the "class of kind of merchandise" to exclude such merchandise in compliance with *Eurodif I* and *II*.

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(Cont'd)

> United States for consumption that meets the description of the merchandise established in the AD order on LEU continues to be subject merchandise. However, pursuant to the *Eurodif I* and *Eurodif II* decisions, Commerce will not assess AD duties on imports of LEU sold under SWU transactions. Whether a sale is excludable on the ground that it constitutes a SWU sale is a question that must be determined in the context of an administrative review by the administering authority analyzing the terms and conditions of the contract, and the parties' performance of such contracts. If the contract in question is determination to be a SWU transaction, consistent with *Eurodif I* and *Eurodif II*, Commerce will not include the SWU price in its dumping margin calculation. Based upon the above, Commerce has not revised the scope of the AD order on LEU.

Remand Redetermination at 4-5.

Put differently, if the Federal Circuit's decisions direct Commerce to modify the order to exclude LEU covered by SWU contracts, then such imports would not be of the "class or kind of merchandise . . . within the scope of . . . an order." Because the holdings of *Eurodif I* and *II* obligate Commerce to "eliminate[ ] all SWU transactions" from its antidumping duty order, *Eurodif III*, 414 F.Supp.2d at 1263, 30 CIT at __, such merchandise may not be of the "class or kind of merchandise" covered by the antidumping duty order. Therefore, pursuant to these opinions, the scope of the order must be redrawn to exclude LEU covered by SWU contracts from the ambit of the "class or kind of merchandise" covered by the order. *See* 19 U.S.C. § 1673e(a)(2) (the antidumping duty order is to include a description of the subject merchandise). When such a modification is made, LEU covered by SWU contracts will therefore no longer be within the "class or kind" of merchandise covered by the antidumping duty order.

Nor do the terms "class or kind of merchandise" require that differentiations between scope and non-scope merchandise be based only on physical characteristics. To the contrary, in determining whether a given product is within the "class or kind" of merchandise under order, Commerce must take into account "[t]he description of the merchandise contained in . . . the determination[ ] of the Secretary . . . ," 19 C.F.R. § 351.225(k)(1); there is no basis for saying that the "description" must embody only the physical attributes of a product. This conclusion is rendered unavoidable when considered in relation to the other

factors of which Commerce may take into account (besides a product's physical characteristics) when considering the scope or an antidumping duty order, namely: (1) the expectations of the ultimate purchaser; (2) the ultimate use of the product; (3) the channels of trade in which the product is sold; and (4) the manner in which the product is advertised and displayed. 19 C.F.R. § 351.225(k)(2); *see also Diversified Prods. Corp. v. United States*, 6 CIT 155, 572 F.Supp. 883 (1983). Consequently, there is a strong basis for an antidumping duty order's differentiation between products based on "non-physical" attributes.

Relatedly, Commerce's assertion that whether a product falls within the scope of an order is something "that must be determined in the context of an administrative review by the administering authority analyzing the terms and conditions of the contract, and the parties' performance of such contracts," Remand Redetermination at 5, is unavailing. Commerce is correct in that it "is responsible for interpreting the antidumping duty order and determining whether certain products fall within the scope of the order as interpreted." *Ericsson GEMobile Commnc'ns, Inc. v. United States*, 60 F.3d 778, 783 (Fed.Cir.1995). But this does not mean that the administrative review is the proper forum to address whether merchandise is within the scope of an order. Rather, when a question regarding the scope of an antidumping duty order arises as it pertains to a specific import, Commerce may, for example, "initiate an inquiry" as to whether a given product falls within the scope of an order, 19 C.F.R. § 351.225(b); additionally,

"any interested party may apply [to Commerce] for a ruling as to whether a particular product is within the scope of an order or a suspended investigation." 19 C.F.R. § 351.225(c). During such a "scope determination," liquidation is suspended on the products at issue, 19 C.F.R. § 351.225(*l*)(2); following a scope determination, any interested party may seek judicial review of Commerce's determination under 19 U.S.C. § 1516a(2)(B)(vi). *See Sandvik Steel Co. v. United States*, 21 CIT 140, 143, 957 F.Supp. 276, 278 (1997) *aff'd Sandvik Steel Co. v. United States*, 164 F.3d 596 (Fed.Cir.1997). As such, Commerce has a mandated procedure, apart from the administrative review, to make such fact intensive/product specific determinations. Accordingly, Commerce's own regulations belie its assertion that an administrative review is the proper forum to raise such objections. Indeed, nothing in the antidumping statute precludes correction of the order in accordance with the holdings of the Federal Circuit issued here. As noted above, Commerce here is required to "specifically explain how its final determination *and order on remand has eliminated all SWU transactions* as required by *Eurodif I and II.*" *Eurodif III*, 414 F.Supp.2d at 1263, 30 CIT at __ (emphasis added).

*Appendix L*

## CONCLUSION

According to the discussion above, Commerce's Remand Redetermination not to re-open the record to further investigate the SWU transactions at issue here is sustained; Commerce's Remand Redetermination with respect to the scope of the order is remanded. On remand Commerce shall address Eurodif's objections in accordance with this opinion and the Court's order in *Eurodif III*. Commerce shall have until June 19, 2006 to provide a remand determination. Parties shall submit comments on Commerce's remand determination no later than June 26, 2006 and rebuttal comments no later than July 7, 2006.

## APPENDIX M — FINAL RESULTS OF REDETERMINATION BY THE DEPARTMENT OF COMMERCE DATED JUNE 19, 2006

Low Enriched Uranium from France
Final Results of Redetermination
Pursuant to Court Remand
*Eurodif S.A., et al. v. United States*
Consol. Ct. No. 02-00219, Slip Op. 06-75
(May 18, 2006 CIT)

### SUMMARY

On January 5, 2006, the U.S. Court of International Trade (CIT) remanded the above-referenced proceeding to the Department of Commerce (Commerce or Department) to revise the final determination (amended) and order in this proceeding in accordance with *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005) (*Eurodif I*) and *Eurodif S.A. v. United States*, 423 F.3d 1275 (Fed. Cir. 2005) (Eurodif II). Pursuant to that remand (*Eurodif S.A. v. United States*, Slip Op. 06-2 (Jan. 5, 2006 CIT) *(Eurodif III)*), on March 3, 2006, Commerce submitted to the CIT its Final Results of Redetermination Pursuant to Court Remand, recalculating the dumping margin by excluding all low enriched uranium (LEU) covered by separative work unit (SWU) contracts from our calculation. On May 18, 2006, the CIT again remanded this matter to Commerce, stating that we should amend the scope of the order and address the objections of Eurodif, S.A., AREVA NC and AREVA NC Inc. (formerly COGEMA and COGEMA Inc.) (collectively, Eurodif). The CIT otherwise sustained

*Appendix M*

Commerce's March 3 Remand Redetermination. *Eurodif S.A. v. United States*, Slip Op. 06-75 (May 18, 2006 CIT) *(Eurodif IV)*.

In accordance with the Court's instructions, we have amended the scope of the order, and we have addressed the objections of Eurodif to our prior remand. We have also outlined the method we intend to use to ensure entries are properly excluded from this order in accordance with the decisions of the courts.

**BACKGROUND**

On February 13, 2002, Commerce published an antidumping duty (AD) order on LEU from France. Respondents challenged the determination arguing that the transactions which involved the enrichment of the uranium (so-called SWU contracts) did not constitute sales of goods, but rather should have been considered service transactions which are not subject to AD law. The CIT agreed, and the case was appealed to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). In *Eurodif I* and *II*, the Federal Circuit ruled that SWU contracts constitute sales of enrichment services, not goods, and, therefore, LEU imported pursuant to SWU contracts was not subject to the AD law. While the Department respectfully disagrees with the conclusion that SWU contracts do not result in the sale of LEU by French producers/exporters to U.S. customers, consistent with the Court's specific remand instructions, we removed all sales made pursuant to SWU contracts from the calculations of the March 3

remand redetermination and we have expressly excluded such merchandise from the scope of the antidumping duty order in the present remand redetermination. For purposes of the present remand redetermination, Commerce is implementing the holdings of *Eurodif I* and *II* as instructed by the CIT in *Eurodif III* and *IV*. We will review the possibility of seeking *certiorari* after final judgement has been rendered in this matter.

**EURODIF IV**

For the reasons set forth in Commerce's March 3, 2006 Remand Redetermination and the United States' March 31, 2006 Response to Parties' Remand Comments, we respectfully disagree with the Court's conclusion in *Eurodif IV* that *Eurodif I* and *II* cannot be implemented without amending the description of the scope of the antidumping order. In accordance with the Court's remand order, we are hereby amending the scope of the order to exclude LEU sold pursuant to SWU contracts and we address below the objections raised by Eurodif to the Court in its comments on the March 3, 2006 Remand Redetermination.

**AMENDED SCOPE**

Pursuant to the CIT's order in *Eurodif IV*, we hereby amend the scope of the AD order on LEU from France to include the following language:

> Also excluded from the scope of this order is LEU produced and imported pursuant to a

> separative work unit ("SWU") transaction. For purposes of this exclusion, a SWU transaction means a transaction in which the parties only contract for the provision of enrichment processing, and the purchasing party is responsible for the provision of natural uranium feedstock to the enricher. At no time, before, during or after enrichment, does the enricher own or hold title to the LEU product delivered under the contract. In order to qualify for the exclusion, the SWU transaction must be performed in accordance with the relevant terms of a written contract for the provision of SWU. Entries pursuant to such SWU transactions must be accompanied by the certification of the end user and enricher.

The certification we will instruct U.S. Customs and Border Patrol (CBP) to require from the utility and enricher upon entry is attached to this redetermination. We will also require that copies of these certifications be filed with the Department of Commerce, and that each certification form filed with the Department include the corresponding entry date and number.

## COMMENTS FROM PARTIES

On June 7, 2006, USEC submitted comments for Commerce to consider in this redetermination. It also submitted a suggested amendment to the scope description, and a proposed certification form. USEC's scope language, proposed certification form, and

arguments address what it views as the four essential issues to be resolved in this redetermination:

1. Defining a SWU transaction by specifying the necessary elements thereof;

2. How these necessary elements should be certified, and who should certify;

3. How Commerce can confirm the accuracy of a certification; and,

4. The type of security needed, if any, between the time of entry and the confirmation of the certification.

After considering USEC's submission, we have concluded the amended scope language stated above and the attached certification form meet the remand requirements. USEC attempts to define the necessary elements of a SWU transaction. Using the elements it identifies, it proposes amended scope language that not only excludes SWU transactions from the scope of the order, but also provides an extended definition of what constitutes a SWU transaction. Similarly, USEC proposes a certification form that it also drafted around the necessary elements it identified. However, the proposed elements appear to be simply an elaborate way of describing the one fact the Federal Circuit found crucial in this case concerning whether a contract is for the provision of a good or service: namely, the transfer of title. For example, in *Eurodif I*, the Federal Circuit

stated that "the SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU. As a result, the 'transfer of ownership' required for a sale under NSK is not present here." *Eurodif I*, 411 F.3d at 1362 (referring to *NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997)). Similarly, in *Eurodif II*, the Federal Circuit referred to the "critical importance of the indisputable fact that, pursuant to the contracts at issue in this case, enrichers never obtain ownership of either the feed (unenriched) uranium during enrichment or the final low enriched uranium ('LEU') product." *Eurodif II*, 423 F.3d at 1278.

It is not merely that the Federal Circuit cites the importance of possession of title as the first among many elements indicating that SWU contracts are contracts for services and not for goods, but, in fact, the Federal Circuit indicates almost no concern with any of the other facts involved in the Eurodif transactions at issue. The remaining elements noted by USEC are mentioned either incidentally in the Federal Circuit's opinions, or not at all. While some of these elements are discussed by the CIT in its opinions, that court also offers a clear statement of its reasoning,[1] and it is not necessary to

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1. *See, e.g., USEC Inc. and United States Enrichment Corporation*, 281 F. Supp. 2d 1334,1340 (Sept 16, 2003 CIT) ("Because the enricher does not obtain ownership of the LEU enriched under SWU contracts, the transfer of LEU by the enricher to the utility cannot constitute a sale of merchandise . . . .").

rely on the sampling of court statements collected by USEC in order to form a definition of a SWU transaction.

In so far as some of the factors cited by USEC might relate to evidence that a transaction is only a SWU transaction on its face, but in terms of performance is actually for the sale of LEU, the amended scope language addresses this concern by requiring that the transaction be performed in accordance with the terms of the written contract. Commerce recognizes that it cannot predict how the written terms and actual performance of contracts certified as "SWU transactions" may differ from the circumstances to which *Eurodif I* and *II* apply. Accordingly, in subsequent proceedings, such as the scope inquiry suggested by the Court, Commerce may determine that it is necessary to provide additional clarification of the scope of this order to further define the meaning of "SWU transaction" in accordance with *Eurodif I* and *II* and to modify the form of the required certification as circumstances warrant.

Because performance of a transaction might not match the terms of an underlying contract, and because the structure of these transactions and the terms of the underlying contracts might change over time, the Department has included requests for certain facts in its certification form. These facts are relevant to some of the elements of a SWU contract identified by USEC, and we find that these requests for information do not place a significant burden on the end user and enricher who must provide such certifications. Answers provided to these questions are intended to assist Commerce in

determining whether a scope inquiry is warranted or whether additional information should be requested.

Regarding USEC's suggestion that we outline a procedure for confirming the accuracy of Eurodif's certifications, we do not think that any procedures beyond the scope inquiries and administrative reviews that USEC can already request are necessary. We do not believe that there would be sufficient time to review relevant documentation before the merchandise enters U.S. customs territory, and therefore to approve of an entry's classification ahead of time, following a procedure similar to that used in suspension agreements. Moreover, given the Court's decision instructing Commerce to specifically exclude from the scope imports of LEU sold through SWU transactions, the Department has limited authority to instruct CBP to suspend liquidation on ostensibly out-of-scope merchandise until the Department has an opportunity to conduct an administrative proceeding after the merchandise has already been entered.

On June 13, 2006, Eurodif submitted objections to USEC's comments. According to Eurodif, by urging the Department to provide an extensive definition of a SWU contract and a corresponding certification form based on the definition, USEC is making an untimely attempt to reassert arguments the CIT and Federal Circuit have rejected previously regarding how to define a SWU contract as narrowly as possible. Eurodif proceeds to examine each of USEC's proposed elements on a point-by-point basis, arguing that each has been dismissed by

the courts previously or is not relevant to what the courts have emphasized in defining a SWU contract. According to Eurodif, the courts' emphasis has been on what the customer paid for: processing. Eurodif also argues that the Department has no authority to suspend entries of out of scope merchandise, and rebuts arguments made by USEC and Commerce (in our prior remand redetermination) that it is inappropriate to amend the language of the scope of this order.

We agree with Eurodif that USEC's proposed defining elements of a SWU transaction misconstrue the focus of the court's reasoning. As discussed above, we agree that the focus of the courts' reasoning has been that in a SWU transaction the enricher does not take title to the merchandise. We think our attached certification also reflects Eurodif's formulation of this focus: that SWU transactions provide for the payment of uranium processing, and nothing else, other than incidentals. Likewise, the certification does not attempt to define a SWU transaction using any other elements. We also agree that it would be inappropriate to attempt to suspend liquidation of entries certified as out of scope. We do not think it is necessary to offer sur-rebuttal regarding Eurodif's comments on our arguments in *Eurodif III* that it is inappropriate to amend the language of the scope in this case, as we were not asked by the Court in *Eurodif IV* to do so.

On one particular point, however, we disagree with Eurodif. We believe it is appropriate to require both the enricher and utility customer to complete the attached

certification. As this Court has stated, the LEU entering the United States pursuant to SWU contracts is identical in all physical respects to LEU that actually has been purchased in France and imported. Thus, the Department must devise a procedure that can be used by CBP and the Department to determine whether an entry is or is not covered by the scope of the antidumping duty order. The only parties who have the documentation necessary to demonstrate that an entry meets the requirements of a SWU transaction are the utility, which retains title to the feedstock as well as the LEU, and the enricher, which fulfills the terms of the SWU contract by processing the feedstock into LEU. Only both of these entities together can demonstrate that the LEU entering the United States is not subject to the antidumping duty order, since these are the two parties who are signatories to the very contracts that cause this merchandise to fall out of the scope.[2] Because it is only the utility and the enricher who can certify that the entry is being made pursuant to a SWU contract, and because there is no other way for CBP to be able to determine at the point of entry whether the LEU from France is or is not subject to antidumping duties, this certification is essential. The certification is the only vehicle through which CBP and the Department can implement, at the point of entry, the Court's decision to exclude LEU imported pursuant to SWU contracts from the scope of the order. In addition, the certification is not burdensome. A similar certification requirement is being

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2. In this case, the enricher's parent has been the actual signatory to the contract.

applied to handle another exclusion from the scope of the antidumping duty order and there is no evidence that the certification is burdensome to the parties.

On June 13, 2006, the Ad Hoc Utilities Group (AHUG) also responded to USEC's comments. AHUG argues, as Eurodif does, that USEC's attempts to define SWU transactions do not match the statements of the courts. As stated, we do not believe the same can be said of our amended scope language and certification form. AHUG also argues that it is improper to "look behind the enrichment contract" at the factual circumstances of the transactions' performance. We believe that the statements by the courts it cites on this issue refer to previous fact-based arguments made by USEC and the Department (*e.g.*, regarding affiliated parties and the timing of feedstock delivery compared to the final product) and do not preclude examining the future performance of contracts to ensure that parties' performance matches the relevant terms of those contracts. AHUG also argues that no special proceedings are needed to confirm the parties' certifications and that we should not suspend liquidation on SWU transactions. As stated elsewhere in this redetermination, we agree with these conclusions.

On June 15, 2006, USEC submitted additional comments in response to those of Eurodif and AHUG. The Department was unable to consider these comments submitted two business days before this remand redetermination was due at the CIT. Consequently, the Department also did not consider comments filed by

Eurodif on June 16, 2006, rebutting USEC's June 15th comments.

## EURODIF'S OBJECTIONS TO COMMERCE'S PRIOR REMAND REDETERMINATION

Eurodif asked the Court to direct Commerce to:

(1) Liquidate all entries without regard to antidumping duties on LEU imported to fulfill SWU contracts (and therefore refund cash deposits already tendered on such entries);

(2) Exclude LEU imported to fulfill SWU contracts from the scope of the order; and,

(3) Cease the suspension of liquidation and any deposit requirement on such entries. If the Court affirms this remand redetermination and such judgment becomes final and conclusive, LEU imported pursuant to SWU transactions will thereby be removed from the scope of the order as described above and Commerce will instruct CPB to cease suspension of liquidation of such entries, and to liquidate such entries without regard to antidumping duties. At such time, with respect to any prior entries not then under the jurisdiction of the courts, Commerce intends to issue instructions for CBP to refund cash deposits on entries of LEU subsequently certified as having entered pursuant to a SWU transaction, cease suspension of liquidation, and liquidate such entries without regard to antidumping duties. Thus, CBP will require the attached certification

from any party claiming such an exclusion, termination of existing suspension, or refund of security. Accordingly, this remand redetermination addresses all of Eurodif's objections to Commerce's March 3, 2006 remand redetermination.

## FINAL RESULTS OF REDETERMINATION

Upon final and conclusive court decisions, Commerce will amend the scope of this order to include the language provided above. Commerce will instruct CBP to cease the suspension of liquidation and any deposit requirements on entries of LEU produced pursuant to SWU contracts, and to refund deposits already collected. Commerce will also instruct CBP to require the attached certification from any party claiming such an exclusion, termination of existing suspension, or refund of security.

s/ David M. Spooner
David M. Spooner
Assistant Secretary
for Import Administration

6/19/06
(Date)

*Appendix M*

## ATTACHMENT: CERTIFICATION TO BE REQUIRED BY CBP UPON ENTRY

## CERTIFICATION FOR ENTRIES OF LOW ENRICHED URANIUM (LEU) FROM FRANCE MADE PURSUANT TO SEPARATIVE WORK UNITS CONTRACTS

DOC Case Number: (*Nine digit case number*)
Entry Date:
Entry Number: (*For copy filed with DOC*)

_____ ("Utility") and _____("Enricher")
(*Name of utility*) (*Name of enricher*)
hereby jointly certify as follows:

1. On _____, 200__, Utility placed an order for the purchase of separative work units ("SWU") with Enricher. Attached are (i) a copy of the order issued by Utility; (ii) the contract for enrichment processing between Utility and Enricher pursuant to which the order was issued; and, (iii) any applicable certificate of the quantity and quality (CQQ) and any applicable nuclear material accountability document (*e.g.*, DOE/NRC 741) for the LEU being imported. These documents are labeled Attachment A, B, and C, respectively.

2. Utility has delivered or will deliver _____ KgU of unenriched natural uranium to Enricher's facility for enrichment on ____, 200__, and Utility retains

title to the unenriched natural uranium prior to sampling and weighing of the LEU before delivery pursuant to the purchase order.

3. Enricher produced _____ KgU of LEU (the "Excluded Merchandise") conforming to the product assay specified in Utility's order.

4. The following cylinders of the Excluded Merchandise are being imported pursuant to the purchase order:

| Cylinder No. | Quantity | Assay |
|---|---|---|

5. At no time during or after enrichment did Enricher own the Excluded Merchandise.

6. Utility and Enricher have performed and will perform the transaction pursuant to which this entry is made in accordance with the relevant terms of the attached contract and will inform U.S. Customs and Border Protection and the Department of Commerce, in writing, if the performance of the contract deviated from its written terms.

7. If any fees were paid to Enricher by Utility in connection with Excluded Merchandise in addition to the fee paid for enrichment processing, please describe the amount and purpose of those fees.

*Appendix M*

| | |
|---|---|
| On behalf of Utility | Date |
| Title | |
| Address | |
| Contact Information | |
| On behalf of Enricher | Date |
| Title | |
| Address | |
| Contact Information | |

## APPENDIX N — OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE DECIDED AUGUST 3, 2006

## UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 02-00219

EURODIF S.A., COMPAGNIE GÉNÉRALE DES MATIÈRES NUCLÉAIRES AND COGEMA, INC., ET.AL.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

August 3, 2006

**JUDGES:** Before: Pogue, Wallach, and Eaton, Judges.

**JUDGMENT**

**PER CURIAM**

On May 18, 2006, we remanded the captioned case to the Department of Commerce ("Commerce") to exclude low enriched uranium enriched under so-called separative work unit contracts from the scope of the

antidumping duty order. *See Eurodif S.A. v. United States*, 30 CIT __, __, 431 F.Supp.2d 1350 (2006). Commerce has since filed a remand determination; the parties have commented thereon. Upon review of that determination, and the parties' comments and rebuttals thereto, we find that Commerce has complied with our remand order. We understand the parties' technical comments on the language of the order and the certification that importers will have to complete upon the entry of low enriched uranium. These technical objections, however, would be better addressed in the context of a concrete dispute over a specific entry. *Cf. Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 812, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003); 19 C.F.R. § 351.225 (outlining the procedure for "scope" determinations). Therefore, it is hereby:

**ORDERED** that the Department of Commerce's remand determination is sustained.

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Nos. 07-1059, 07-1078

FILED
MAR 21 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

# In The Supreme Court of the United States

**UNITED STATES OF AMERICA; USEC INC.; and UNITED STATES ENRICHMENT CORPORATION,**

***Petitioners,***

**v.**

**EURODIF S.A.; COMPAGNIE GENERALE DES MATIERES NUCLEAIRES; COGEMA, INC.; and THE AD HOC UTILITIES GROUP,**

***Respondents.***

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals was correct in holding that under the plain language of the antidumping statute, 19 U.S.C. § 1673, contracts for the sale of uranium enrichment services are not sales of merchandise, and therefore that sales of enrichment services under those contracts are not subject to the statute.

## RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the members of the Ad Hoc Utilities Group (hereinafter "AHUG") joining in this Brief in Opposition list their respective parent companies and nonwholly owned subsidiaries as follows:

1. The parent company of respondent Dominion Energy Kewaunee, Inc. is Dominion Resources, Inc. Dominion Energy Kewaunee, Inc. has no nonwholly owned subsidiaries.

2. The parent company of respondent Dominion Nuclear Connecticut, Inc. is Dominion Resources, Inc. Dominion Nuclear Connecticut, Inc. has no nonwholly owned subsidiaries.

3. The parent company of respondent Duke Energy Carolinas, LLC is Duke Energy Corporation. Duke Energy Carolinas, LLC has no nonwholly owned subsidiaries.

4. The parent company of respondent Entergy Services, Inc. is Entergy Corporation. Entergy Services, Inc. has no nonwholly owned subsidiaries.

5. Respondent Exelon Corporation has no parent and three nonwholly owned subsidiaries: Sithe Energies, Inc., Comed, and PECO.

6. The parent company of respondent Florida Power & Light Company is FPL Group, Inc. Florida Power & Light Company has no nonwholly owned subsidiaries.

7. Respondent Nebraska Public Power District has no parent or nonwholly owned subsidiaries. It is a political subdivision of the State of Nebraska.

8. The parent company of respondent PPL Susquehanna, LLC is PPL Corporation. PPL Susquehanna, LLC has four nonwholly owned subsidiaries: PPL Electric Utilities Corporation, PPL Energy Supply LLC, PPL Montana LLC, and PPL Transition Bond Company LLC.

9. The parent company of respondent Progress Energy Carolinas, Inc., formerly known as Carolina Power & Light Company, is Progress Energy, Inc. Progress Energy Carolinas, Inc. has no nonwholly owned subsidiaries.

10. The parent company of respondent Progress Energy Florida, Inc., formerly known as Florida Power Corporation, is Progress Energy, Inc. Progress Energy Florida, Inc. has no nonwholly owned subsidiaries.

11. The parent company of respondent Southern California Edison Company is Edison International. Southern California Edison Company has three nonwholly owned subsidiaries: Edison Mission Energy (issuing equity or debt securities through Edison Mission Energy Funding Corp., Midwest Generation LLC, Midwest Finance Corp., and Edison Mission Holdings Co.), Edison Capital (through its financing subsidiary Edison Funding Co.), and SCE Funding LLC.

12. The parent company of respondent Southern Nuclear Operating Company, Inc. is the Southern Company. Southern Nuclear Operating Company, Inc. has no nonwholly owned subsidiaries.

13. The parent company of respondent Union Electric Company, d/b/a AmerenUE, is Ameren Corporation. Union Electric Company has three nonwholly owned subsidiaries: Central Illinois Public Service Company d/b/a AmerenCIPS, Central Illinois Light Company d/b/a AmerenCILCO, and Illinois Power Company d/b/a AmerenIP.

14. The parent company of respondent Virginia Electric & Power Company is Dominion Resources, Inc. Virginia

Electric & Power Company has no nonwholly owned subsidiaries.

15. The parent company of respondent Wolf Creek Nuclear Operating Corporation is Westar Energy, Inc. Wolf Creek Nuclear Operating Corporation has one nonwholly owned subsidiary, Great Plains Energy, Inc.

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Respondent the Ad Hoc Utilities Group ("AHUG") is comprised of fifteen domestic utilities that represent the majority of commercial nuclear power generation in the United States.[1] AHUG respectfully submits this brief in opposition to the petitions for certiorari submitted by the United States ("Government") and USEC Inc. and the United States Enrichment Corporation (collectively, "USEC").[2]

## STATEMENT OF THE CASE

This case involves an administrative proceeding under the provisions of the Tariff Act of 1930. Those provisions authorize the Government to impose offsetting customs duties ("antidumping duties") when the Department of Commerce ("Commerce") finds, among other conditions, that imports of foreign merchandise are being sold at a lower price in the United States than they are sold in the home country market of the foreign producer or exporter.

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[1] The members of the Ad Hoc Utilities Group are Dominion Energy Kewaunee, Inc.; Dominion Nuclear Connecticut, Inc.; Duke Energy Carolinas, LLC; Entergy Services, Inc.; Exelon Corporation; Florida Power & Light Company; Nebraska Public Power District; PPL Susquehanna, LLC; Progress Energy Carolinas, Inc.; Progress Energy Florida, Inc.; Southern California Edison Company; Southern Nuclear Operating Company; Union Electric Company (d/b/a AmerenUE); Virginia Electric & Power Company; and Wolf Creek Nuclear Operating Corporation.

[2] The Government's and USEC's petitions are respectively referenced hereinafter as "Gov't Pet." (Gov't App.) and "USEC Pet." (USEC App.).

The antidumping proceeding at issue involved imports of low enriched uranium ("LEU") from Eurodif S.A. ("Eurodif") of France. Commerce evaluated purchases by American electric utility companies of a foreign manufacturing service – the enrichment of the utilities' uranium for ultimate use in commercial nuclear reactors – and deemed them to be purchases of merchandise, LEU. On appeal, the Court of Appeals for the Federal Circuit concluded that the contracts at issue were for the sale of services, not LEU, and that the antidumping statute unambiguously did not apply to sales of services.

Neither the Government nor USEC raise any issues worthy of Supreme Court review. Specifically, the decision of the Federal Circuit challenged by the Petitioners involves a routine application of the standard of deference established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 487 U.S. 837 (1984). The Federal Circuit has not decided an important question of law not previously settled by this Court's decisions on the review of agency decisions, or with which relevant decisions of the Court are in conflict. Moreover, the dispute arises in the context of the highly complex and unique marketplace for nuclear fuel manufacturing services. The fact specific nature of the issues in this case raise no issues of general application and none worthy of certiorari review by this Court. Accordingly, the instant petitions should be denied.

## A. The Enrichment Of Uranium Is An Intermediate Manufacturing Process In The Production Of Nuclear Fuel Assemblies

Utilities use fuel rod assemblies containing enriched uranium in nuclear reactors as part of a process in which water is heated to produce steam, which in turn passes through turbines to generate electricity.

Typically, utilities arrange for the production of their own nuclear fuel rod assemblies through multiple contracts for manufacturing services. The utility generally begins the nuclear fuel production process by purchasing a quantity of milled uranium ore. It then contracts with a conversion service provider to chemically transform the ore into gaseous uranium hexafluoride ($UF_6$), commonly referred to as uranium "feedstock." Next, the utility separately contracts with an enrichment service provider to enrich the $UF_6$ in the fissionable isotope $U^{235}$ to a level specified by the utility. As a final step, the utility contracts with a fabrication service provider to chemically transform the enriched uranium hexafluoride into an oxide ($UO_2$), press the oxide into pellets, encapsulate the pellets in tubes, and bundle the tubes into fuel assemblies for insertion in the utility's nuclear reactors. The utility retains ownership of the uranium in all of its

chemical forms throughout these stages of nuclear fuel production.[3]

All mined uranium originally contains 0.711 percent of fissionable isotope $U^{235}$. Enrichment is the process by which the heavier isotopes of uranium are separated from the lighter isotopes to increase the percentage of $U^{235}$ in a portion of the uranium. Enrichment results in a quantity of enriched uranium and a waste stream of depleted uranium, known as "tails." This process involves a trade-off between the amount of uranium feedstock used and the amount of energy expended (the energy is referred to as Separative Work Units, or "SWU"). The same quantity of LEU enriched to the same $U^{235}$ isotope level (or "assay") can be produced by using either less uranium feedstock and more SWU (to separate more $U^{235}$ from the "tails" portion of the uranium), or more uranium feedstock and less SWU. When purchasing enrichment services, utilities deliver uranium feedstock to the enricher, specify the required level of enrichment, and pay for the service of enriching that uranium to the desired

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3 *See Low Enriched Uranium From France*, 66 Fed. Reg. 65,877, 65,879 (Dep't of Commerce Dec. 21, 2001) (notice of final determination of sales at less than fair value) (hereinafter *Low Enriched Uranium from France Final AD Determination)* (Gov't App. 230a-231a).

level, based on the amount of SWU expended by the enricher.[4]

Because the amount of uranium feedstock provided and the level of enrichment required varies from transaction to transaction, two utilities purchasing the same amount of SWU may have very different quantities of LEU delivered to them after the enrichment processing service is completed. Similarly, deliveries by enrichers of the same quantity of LEU to two utilities may reflect the use of different quantities of uranium feedstock and enrichment services.[5]

Under enrichment services contracts the utilities retain ownership of the uranium feedstock they provide to the enrichers. Thus, the enrichers do

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[4] During the antidumping proceeding at issue, the enrichment process represented approximately 65 percent of the value of LEU. *USEC Inc. v. United States*, 259 F. Supp. 2d 1310, 1325 (Ct. Int'l Trade 2003) (*"USEC I"*) (Gov't App. 205a). The price of milled uranium ore has since increased by approximately 800 percent (from under $8 per pound in 2000 to $73 in 2008) and now represents a greater portion of the LEU's value. Ux Consulting, *Ux Current and Historical Price Indicators*, *available at* http://www.uxc.com/review/uxc_g_price.html.

[5] Alternatively, a utility sometimes purchases completed LEU through a contract for "enriched uranium product" ("EUP"), which it subsequently arranges to be fabricated into nuclear fuel assemblies. Under an EUP contract, the utility pays the seller a price that reflects all elements of the LEU's value, including the milled uranium, the conversion services, and the enrichment services. *USEC I*, 259 F. Supp. 2d at 1314-15 (Gov't App. 182a-185a). The application of the antidumping law to EUP transactions is not at issue in this proceeding.

not report that feedstock as an asset on their books, and have no legal obligation to pay property, sales, or income taxes on it. The enrichers do not know the cost of the uranium feedstock that the utilities provide, and such values can vary considerably, because utilities purchase uranium concentrates under long-term contracts from a variety of sources in different countries at different prices. *USEC I*, 259 F. Supp. 2d at 1314-15 (Gov't App. 182a-185a). The courts have consistently viewed enrichment services contracts as contracts for services, in a variety of legal contexts.[6]

This method of contracting separately for enrichment services was originally established by the U.S. Government. The existing 104 operating nuclear plants in the United States were ordered in the 1960s and 1970s. At the time the utilities entered into contracts for the construction of their nuclear reactors, they were required to sign contracts for uranium enrichment services with the U.S. Government. *USEC I*, 259 F. Supp. 2d at 1316 (Gov't App. 186a). During that period there was no

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[6] *See, e.g., Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002) (applying the Contract Disputes Act); *Centerior Service Co. v. United States*, No. 95-103C, 1997 U.S. Claims LEXIS 323, at *19 (Dec. 17, 1997) (applying the Uniform Commercial Code); *Barseback Kraft AB v. United States*, 36 Fed. Cl. 691, 705 (1996) (applying the Uniform Commercial Code); *see also DOE Uranium Enrichment Program*, 51 Fed. Reg. 11,811, 11,812 (Dep't of Energy Apr. 7, 1986) (request for expression of interest for participation) (describing enrichment as "an arrangement whereby uranium supplied by a customer is enriched in uranium-235 content by DOE and then returned to that customer" and stating that such "[s]ervices are provided under contracts which are generally signed with publicly or privately owned utilities.").

alternative source of enrichment services. Later, the U.S. Government lifted its own monopoly and allowed foreign entities to provide enrichment services to utilities, and eventually privatized its own enrichment operation, which became USEC. 42 U.S.C. § 2297h-10. Two years after it was privatized in 1998, USEC initiated antidumping proceedings against imports of LEU from its two main competitors, who have facilities in four European countries. The appeal at issue arises from the proceeding against Eurodif.[7]

## B. The Antidumping Law

The antidumping statute authorizes Commerce to impose antidumping duties if it "determines that a class or kind of *merchandise is being*, or is likely to be, *sold* in the United States at less than fair value [and such sales cause material

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[7] USEC simultaneously initiated countervailing duty proceedings against the same imports of LEU, which were the subject of separate court appeals. (Countervailing duty proceedings involve investigations of whether foreign governments are providing subsidies that benefit exports.) In the countervailing duty proceeding involving Eurodif's exports from France, the Federal Circuit also held that an enrichment contract was a purchase of a service and not of a good. *Eurodif S.A. v. United States*, 411 F.3d 1355, 1364-65 (Fed. Cir. 2005) *("Eurodif I")* (Gov't App. 24a-27a). The Government and USEC did not seek certiorari review of that decision, and the countervailing duty order consequently was revoked. The antidumping investigation of the other European enricher, Urenco, resulted in a determination of no dumping. *Low Enriched Uranium from the United Kingdom, Germany and the Netherlands*, 66 Fed. Reg. 65,886, 65,888 (Dep't of Commerce Dec. 21, 2001) (notice of final determinations of sales at not less than fair value).

injury or threat thereof]." 19 U.S.C. § 1673 (2000) (emphasis added). In general, merchandise is deemed sold at less than fair value if its price in the United States is less than its price in the exporter's home country market.

The purpose of the antidumping law is to allow special customs duties to be imposed to offset price discrimination by particular sellers in the country subject to an antidumping investigation, based on an examination of actual sales. The law provides detailed rules on how transactions are to be analyzed and compared, including how adjustments are made to account for differences in the circumstances of sales – *e.g.*, differences in transportation costs, whether a transaction reflects a quantity discount, whether sales are made at the wholesale or retail level, etc. 19 U.S.C. §§ 1677a - 1677b (2000). Accordingly, the law requires a specific examination of each sale of merchandise to support a determination that sales are being made at less than fair value, and separate antidumping duty rates are calculated for each foreign producer and exporter that participates in the proceeding. 19 U.S.C. § 1677f-1 (2000). Generalized assumptions about transactions are not permitted.

Transactions in contract manufacturing services such as uranium enrichment are not unusual, and Commerce previously developed policies for applying the antidumping statute to contract manufacturing. In recognition that the antidumping statute applies only to sales of merchandise and not to sales of services, Commerce issued a regulation distinguishing between sales of

merchandise, which are relevant in an antidumping analysis, and sales of manufacturing services associated with such merchandise, which are not. The regulation provides in pertinent part that "[Commerce] will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product." 19 C.F.R. § 351.401(h) (2007).[8] Except for uranium enrichment services, Commerce has relied upon Section 351.401(h) to establish a consistent practice – confirmed by the courts – of finding that contracting for manufacturing services does not constitute a relevant sale of the resulting merchandise. *See, e.g., Taiwan Semiconductor Manufacturing Co., Ltd. v. United States*, 143 F. Supp. 2d 958, 966 (Ct. Int'l Trade 2001) ("Commerce's use of 'relevant sale' ... furthers congressional intent for Commerce to determine whether subject merchandise is being, or is likely to be, sold in the United States at less than its fair value.").[9] On that basis, Commerce previously has held that sales of contract manufacturing services cannot be the basis of a determination of sales of merchandise at less than fair value.

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[8] "Toll producers" are entities that produce merchandise for other parties through contract manufacturing service arrangements.

[9] *See also Dynamic Random Access Memory Semiconductors of One Megabit and Above ("DRAMs") From Taiwan*, 64 Fed. Reg. 56,308, 56,318 (Dep't of Commerce Oct. 19, 1999) (notice of final determination of sales at less than fair value) (treating sales of Taiwanese contract manufacturing service provider as services, not sales of merchandise).

## C. The Proceedings Below

At the request of USEC, in December 2000 Commerce initiated antidumping and countervailing duty investigations of imports of LEU from France, Germany, the United Kingdom and the Netherlands. It published its final determination in the antidumping proceeding involving France on December 21, 2001. *Low Enriched Uranium from France Final AD Determination*, 66 Fed. Reg. at 65,877 (Gov't App. 220a-262a). Commerce's determination that Eurodif had made sales at less than fair value was based primarily on sales of enrichment services.

The question whether enrichment contracts should be considered sales of services or of goods was thoroughly briefed during the administrative proceedings. In its initial determination, Commerce stated that "[w]hile we recognize that the provision of uranium feedstock may not be a payment-in-kind in the formal sense under these contracts, we maintain that the arrangement between buyer and seller in a SWU contract nonetheless is dedicated to the delivery of LEU, and critical to the trade in LEU." *Id.* at 65,884-65,885 (Gov't App. 254a-255a). Moreover, it was uncontested that the utilities did not sell the LEU produced from their feedstock. Nonetheless, Commerce concluded that "[i]t does not matter whether the producer/exporter [Eurodif] sold subject merchandise as subject merchandise, or whether the producer/exporter sold some input or manufacturing process that produced subject merchandise, as long as the result of the producer/exporter's activities is subject merchandise

entering the commerce of the United States." *Id.* at 65,885 (Gov't App. 232a, 254a-255a).

The Court of International Trade ("CIT") disagreed. It examined the enrichment contracts and concluded they were sales of services, not LEU. The CIT went on to hold that it could not reconcile Commerce's conclusions with a number of prior cases in which Commerce itself had determined that transactions in manufacturing services were not sales of subject merchandise. Specifically, the CIT noted that Commerce had previously recognized that "where the price paid for subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping duty law." *USEC I*, 259 F. Supp. 2d at 1325 (Gov't App. 205a-206a). The CIT remanded the case to Commerce for reconsideration. *Id.* at 1331 (Gov't App. 219a).

In its remand determination, Commerce reaffirmed its prior conclusions, asserting that "the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value." *Low Enriched Uranium from France Remand Redetermination* (June 23, 2003) at 52 (USEC App. 211a). On appeal, the CIT again rejected Commerce's approach, stating that:

> Commerce's duty is to investigate "sales" at less than fair value. The agency's assertion that the enrichers' transactions with the utilities are the only transactions that could be such

> sales, without more, does not establish that there is an evidentiary or legal basis to conclude that those transactions constitute sales for purposes of our antidumping statutes.

*USEC Inc. v. United States*, 281 F. Supp. 2d 1334, 1340 (Ct. Int'l Trade 2003) (Gov't App. 45a-46a). The parties thereafter obtained an order from the CIT permitting an interlocutory appeal, pursuant to 28 U.S.C. § 1292(d)(1), on the issues relating to Commerce's proposed treatment of contracts for manufacturing services as contracts for the sale of merchandise.

The Federal Circuit affirmed the CIT's conclusion that enrichment services transactions are not sales of goods. *Eurodif I*, 411 F.3d 1355 (Gov't App. 8a-28a). It agreed that the enrichment contracts "do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU." *Id.* at 1362 (Gov't App. 20a). The Federal Circuit concluded that enrichment transactions therefore were not "sales" of merchandise under the antidumping law, because "the 'transfer of ownership' required for a sale under [*NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997)] is not present here." *Id.* (Gov't App. 20a). The court also observed that in a recent case arising under the Contracts Disputes Act, *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002), it had agreed with the Government's position that uranium enrichment contracts were sales of services. The Federal Circuit found the reasoning in that

decision persuasive regarding the nature of the contracts, although it noted that "*Florida Power* is not binding precedent for this case." *Eurodif I*, 411 F.3d at 1663-64 (Gov't App. 21a, 23a-24a).[10]

The Government and USEC sought rehearing and rehearing *en banc*, and brought to the attention of the Federal Circuit this Court's decision in *National Cable & Telecommunications Assoc. v. Brand X Internet Services*, 545 U.S. 967 (2005). In *Brand X*, this Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982.

The Federal Circuit denied rehearing *en banc*, and granted rehearing for the limited purpose of addressing the application of *Brand X*. In its rehearing decision, the Federal Circuit emphasized that it had not relied on *Florida Power* as binding precedent. To confirm its decision complied with *Brand X*, the Federal Circuit clarified that "the antidumping duty statute unambiguously applies to the sale of goods and not services." *Eurodif S.A. v. United States*, 423 F.3d 1275, 1278 (Fed. Cir. 2005) *("Eurodif II")* (Gov't App. 33a). The Federal Circuit further noted its original decision's holding that the

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10 The Government itself argued to the Federal Circuit that *Florida Power* was relevant and supported Commerce's determination because in *Florida Power* the Federal Circuit had stated that its decision on the nature of the enrichment contracts was a difficult one. Gov't Pet. at 15.

provision of services clearly was not covered by the antidumping law, and affirmed its conclusion that "Commerce's characterization of the SWU contracts at issue in this case would contradict ... the statute's unambiguous meaning because it is clear that those contracts are contracts for services and not goods." *Id.* (Gov't App. 33a).

On remand, Commerce removed the enrichment transactions from its calculations, but initially resisted excluding LEU imported pursuant to enrichment services transactions from the antidumping order. *Final Results of Low Enriched Uranium from France Remand Redetermination* (Mar. 3, 2006) at 4-5 (USEC App. 323a-325a). On appeal, the CIT held that because such LEU is never sold, Commerce was required to exclude such imports from the scope of the antidumping order. *Eurodif S.A. v. United States*, 431 F. Supp. 2d 1351, 1354-57 (Ct. Int'l Trade 2006) (USEC App. 327a-339a). In the subsequent remand determination, Commerce modified the scope of the antidumping order accordingly, and issued a form by which Eurodif and the utilities could certify that specific imports met the conditions for exclusion. *Final Results of Low Enriched Uranium from France Remand Redetermination* (June 19, 2006) at 1 (USEC App. 341a).

After the CIT affirmed the remand results, the Government and USEC appealed to the Federal Circuit the limited question of whether Commerce should be required to exclude imports under enrichment contracts immediately or only after Commerce conducted further factual analysis. The

Federal Circuit dismissed the appeal as unripe. *Eurodif S.A. v. United States*, 506 F.3d 1051 (Fed. Cir. 2007) (Gov't App. 2a). The Petitioners then sought review in this Court of the Federal Circuit's decision in the interlocutory appeal issued in 2005.

## ARGUMENT

### A. This Case Involves Only A Routine Application Of The *Chevron* Standard Of Deference

The Federal Circuit held that the antidumping statute unambiguously applies to the sale of goods and not to sales of services. *Eurodif II*, 423 F.3d at 1278 (Gov't App. 33a). That holding satisfies the threshold test of *Chevron* and *Brand X*. Having found no ambiguity, the Federal Circuit applied the plain meaning of the statute and no deference was due Commerce. Even if the Federal Circuit had erred – and it did not – this case does not raise any issue of administrative law not previously addressed by this Court.

Faced with the Federal Circuit's clear holding, the Petitioners attempt to divert attention from the actual substance of the Federal Circuit's ruling and the applicable precedents. Both Petitioners argue that the meaning of "sold" is ambiguous, and cite to cases arising under different and irrelevant regulatory regimes in support of an argument that Commerce should be given broad discretion in interpreting that word. Gov't Pet. at 18; USEC Pet. at 21. Neither mentions that, as discussed below, the Federal Circuit previously and correctly applied

*Chevron* in interpreting precisely that same word, nor that the Federal Circuit relied on that prior decision in making its holding in this case.

Specifically, in *NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997), Commerce treated as "sales" free samples given by a foreign manufacturer to some of its U.S. customers, thereby placing squarely at issue the meaning of the word "sold" in section 1673. In *NSK* the Government argued, as it does here, that not deferring to Commerce's interpretation would create a loophole in the antidumping law. *Id.* at 972. As part of a detailed analysis, the Federal Circuit held that "Congress intended to give the term its ordinary meaning ...." *Id.* at 974. It also stated that "contrary to the Government's suggestion, we do not believe that the term 'sale' should be given any special meaning under the antidumping laws." *Id.* The Federal Circuit concluded "[t]he terms of the statutory provisions are clear on their faces and we see no reason to depart from the ordinary meaning of the term 'sold' or 'sale'. We thus need not reach the second prong of the *Chevron* analysis." *Id.* at 975.

In the instant case, the Federal Circuit expressly relied on *NSK* for its principal holding, as follows:

> [T]he SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU. As a result, the "transfer of

> ownership" required for a sale under *NSK* is not present here.

*Eurodif I*, 411 F.3d at 1362 (Gov't App. 20a). Because the holding in *NSK* was based on a finding that the statute was unambiguous, the requirements of *Brand X* were satisfied. Accordingly, there was no requirement for the Federal Circuit to defer to Commerce's interpretation of "sold" under the second prong of *Chevron*.

In its decision on rehearing, the Federal Circuit further reinforced its holding by stating as follows:

> We now clarify by stating expressly that the antidumping duty statute unambiguously applies to the sale of goods and not services. In our opinion, we stated that "under the statutory scheme adopted by Congress, the sale of goods (or 'merchandise') is covered by the antidumping duty statute" but that the "provision of services, however, is not ...." *Eurodif I*, 411 F.3d at 1361. While we did not use the term "unambiguous", we clearly foreclosed any argument that § 1673 is ambiguous on the precise question of whether the antidumping duty statute encompasses contracts for services. It undoubtedly does not.

*Eurodif II*, 423 F. 3d at 1278 (Gov't App. 33a).

USEC's complaint that the Federal Circuit improperly relied on *Florida Power* contrary to *Brand X* is misplaced, because the Federal Circuit expressly stated that "*Florida Power* is not binding precedent for this case." *Eurodif I*, 411 F.3d at 1363 (Gov't App. 21a). Recognizing that *Florida Power* did not arise under the antidumping statute, the Federal Circuit found *Florida Power* instructive on the nature of the contracts because it involved contracts for uranium enrichment services, and because in *Florida Power* the Government itself had argued successfully that the contracts were for services. *Id.* at 1363-64 (Gov't App. 21a-24a). *Brand X* is not implicated by the Federal Circuit's reference to *Florida Power*.

Crucially, both the Government and USEC now acknowledge that the antidumping statute applies only to the sale of goods. Gov't Pet. at 3; USEC Pet. at 5.[11] In an effort to evade that limitation, however, they rely on an individual contract provision taken out of context to allege that

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[11] USEC argues that a completely separate statute applying to a different subject – international trade negotiations – should be interpreted to override the plain meaning of "services" and limit it to activities not involving manufacturing. USEC Pet. at 28. However, the statute cited by USEC, 19 U.S.C. § 2114b(5), is not part of the antidumping statute. Moreover, the U.S. Government itself has included "services incidental to manufacturing" (such as the manufacture of nuclear fuel on a fee or contract basis) within the scope of the negotiations on energy services in the World Trade Organization's General Agreement on Trade in Services. *See* Communication from the United States to the Council on Trade in Services, S/CSS/W/24 (Dec. 18, 2000) *available at http://docsonline.wto.org/DDFDocuments/t/S/CSS/W24.doc*.

the provision of uranium feedstock for enrichment is a type of barter or payment-in-kind transaction. Gov't Pet. at 22-23; USEC Pet. at 26.[12] Contrary to the Government's assertion that the utilities do not own the LEU until it is delivered to them, Gov't Pet. at 21, the contracts make clear that the utilities are deemed to receive back their own uranium, and that uranium is never owned by the enricher. *Eurodif I*, 411 F.3d at 1362 (Gov't App. 20a) ("In reviewing the contracts in this case, it is clear that ownership of either the unenriched uranium or the LEU is not meant to the vested in the enricher during the relevant time periods that the uranium is being enriched."). Indeed, both the CIT and the Federal Circuit rejected Commerce's strained view of the contracts, finding that they are clearly purchases of enrichment and not LEU. For that reason, the Petitioners now ask this Court to analyze the Petitioners' hypotheses about the nature of specific contract provisions, and to construe whether it is

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[12] The characterization of enrichment services contracts as barter transactions was contradicted not only by the plain terms of the contracts, but also by the fact that the enrichers never know the value of the uranium feedstock provided by the utilities. For that reason, Commerce was forced to invent a price for the LEU in its determination. It stated that "[i]n assigning a specific monetary value to the natural uranium component, we estimated the market value," and "[f]or SWU contracts, when comparing [prices of LEU], we valued natural uranium using exactly the same value for both sides of the equation." *Low Enriched Uranium from France Final AD Determination*, 66 Fed. Reg. at 65,885 (Gov't App. 257a). Thus, in making its dumping calculations, Commerce relied on fictional values for the uranium contained in the LEU, applied an equation that cancelled out the uranium values entirely, and based its price comparisons on the sales of enrichment services.

significant that uranium feedstock is a fungible input. These are not issues of broad legal or factual application. They are specific to the nuclear fuel industry, and not appropriate for review by this Court.

The Petitioners seek to avoid the fundamental point that because enrichment contracts involve only the purchase of a manufacturing service and not the enriched uranium as a whole, there can be no "sale of merchandise" within the meaning of the antidumping statute. As discussed above, Commerce has consistently viewed transactions in manufacturing services as not involving a sale of goods subject to the antidumping statute.[13] In this case, Commerce is attempting to create a unique exception to its own regulations, and the antidumping statute itself, to treat enrichment services as sales of LEU. However, Commerce may not create new restrictions on transactions in manufacturing services without statutory authorization from Congress.[14] For the Federal

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[13] For example, in *Taiwan Semiconductor*, 143 F. Supp. 2d at 966, the CIT affirmed Commerce's determination that the sale of manufacturing services is not a sale of the goods being manufactured. Commerce's regulation on contract manufacturing, as applied in that case and others, derives from the statutory requirement that a finding of dumping be based on sales of merchandise – the same requirement the Petitioners now seek to evade.

[14] The Government acknowledges that an effort is currently being made to enact special legislation targeting enrichment services transactions. Gov't Pet. at 26 n.4. That effort reflects a recognition that the antidumping statute does not reach manufacturing services such as uranium enrichment.

Circuit to reject Commerce's attempt to do so in this case is entirely consistent with the standard of review provided by this Court under *Chevron* and *Brand X*.

## B. The Facts Of This Case Are Narrow And Unique

As discussed above, the manner in which nuclear reactor assemblies are made and purchased is unique, in that the imports of LEU are not sold but rather are consumed by the utilities that arranged for their production. The Petitioners' argument that this unique situation creates a "loophole" in the antidumping statute is wholly unfounded, for two reasons.

First, there has never been an allegation that the utilities restructured their contracts to evade the antidumping law. The method of contracting separately for enrichment services was originally mandated by the U.S. Government in the 1960s, almost 40 years before the antidumping proceeding was initiated. The CIT specifically addressed this issue, finding that "[t]he contract here is not simply a restructured purchase contract." *USEC I*, 258 F. Supp. 2d at 1322 n.12 (Gov't App. 198a).

Second, the examples given by the Government and *amicus curiae* Committee to Support U.S. Trade Laws ("Committee") of products that could be contract-manufactured abroad for sale in the United States – such as steel, lumber, pasta,

textiles, and semiconductors[15] – are all readily captured under the existing statute and regulations, which are left undisturbed by the decision of the Federal Circuit in this case. Indeed, in the *Taiwan Semiconductor* case discussed above, sales of the imported semiconductors by the U.S. importer (as opposed to sales of manufacturing services by the Taiwanese service provider to the U.S. importer) were included in the scope of the proceeding. Moreover, Commerce has previously applied its doctrine that sales of manufacturing services are not sales of merchandise in cases involving steel and pasta, as well as in another case involving semiconductors.[16] The ultimate sales of those products in the United States were in each case within the scope of the antidumping statute, because the merchandise was actually sold.[17]

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15 Gov't Pet. at 25; Committee Br. at 7-10.

16 *Certain Forged Stainless Steel Flanges from India*, 58 Fed. Reg. 68,853 (Dep't of Commerce Dec. 29, 1993) (notice of final determination of sales at less than fair value); *Stainless Steel Wire Rod from Sweden*, 63 Fed. Reg. 40,449 (Dep't of Commerce July 29, 1998) (notice of final determination of sales at less than fair value); *Certain Pasta from Italy*, 63 Fed. Reg. 53,641 (Dep't of Commerce Oct. 6, 1998) (prelim. results of new shipper antidumping duty admin. review), *aff'd*, *Certain Pasta from Italy*, 64 Fed. Reg. 853 (Dep't of Commerce Jan. 6, 1999) (final results of new shipper antidumping duty admin. review); *DRAMS from Taiwan*, 64 Fed. Reg. 56,308.

17 The antidumping statute also contains provisions to ensure that sales of imported products can be captured when the merchandise is incorporated into other products before it is sold in the United States. 19 U.S.C. 1677a(e).

Under the existing law – unaffected by the Federal Circuit's decision – if a broker were to sell imported LEU for which it had contracted production, that sale would be subject to the antidumping statute. But that is not the situation at issue here, and neither the Petitioners nor the Committee has identified another industry in which U.S. companies arrange for foreign contract production of merchandise that they consume themselves. That is not the situation for foreign-made steel products, lumber, pasta, textiles or semiconductors, all of which are sold after importation into the United States.

In sum, while the Petitioners argue that the *Eurodif* decisions must be overturned to prevent a loophole in the antidumping law, no such loophole exists. In every other case identified by the Petitioners, the imported goods are subject to the antidumping law because those goods are eventually sold. The Petitioners simply seek to twist a statute of general applicability out of shape in order to achieve a specific result tailored to the facts of one particular – and unique – industry. Such a results-driven application of the law is not a legitimate basis for legal interpretation, and certainly not sufficient justification for the granting of certiorari.

### C. The Petitioners' Characterizations Of "Foreign Policy" And "National Security" Interests Are Factually Incorrect And Inapposite

The Petitioners argue that there are several non-legal policy reasons why the Court should grant

certiorari, primarily claiming that the Federal Circuit's decision threatens national security, U.S. energy policy, and the financial well-being of a publicly held company, USEC. Gov't Pet. at 25-32; USEC Pet. at 32-37. Those policy arguments are all based on the projected effect of this case on a different case: an antidumping proceeding involving imports of uranium from Russia.

An import restriction imposed under the antidumping statute in the Russian uranium proceeding prohibits utilities from purchasing enrichment services directly from the Russian enricher. Meanwhile, USEC serves as the U.S. "executive agent" of Russian enrichment services provided under the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons, U.S.-Russ., Feb. 18, 1993, State Dep't No. 93-59, 1993 WL 152921 (hereinafter "HEU Agreement"). The HEU Agreement is a government-to-government arrangement under which Russia has committed to sell the enrichment services associated with LEU that has been "downblended" from weapons-grade uranium. USEC has been given the exclusive right to resell the enrichment services supplied by Russia under the HEU Agreement as the U.S. "executive

agent" (*i.e*, broker) for the HEU Agreement.[18] According to the Petitioners, using the antidumping statute to prevent the utilities from contracting directly with the Russian enricher preserves "market conditions" that encourage Russia to comply with its obligations under the HEU Agreement.

The Petitioners' policy argument presumes, without providing any evidentiary support, that there is a significant risk that Russia will abandon its treaty obligations under the HEU Agreement. They also allege that Russia is capable of selling substantial additional amounts of commercial enrichment services to the United States, but that

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[18] Although the Petitioners appear to suggest otherwise, USEC is not the only company capable of serving as the broker of Russian enrichment services provided under the HEU Agreement. In 1999 USEC announced it was considering withdrawing from that role. When other companies -- including members of AHUG – proposed to take over or supplement USEC's role as the executive agent, USEC opposed those proposals and reclaimed the position for itself. Accordingly, its role as the executive agent is voluntary.

specific issue is contested and currently is *sub judice* in the CIT.[19]

Regardless, the U.S. utilities continue to fully support the HEU Agreement, which could not exist absent the utilities' purchases of the Russian enrichment services provided to them through USEC. Nonetheless, when the HEU Agreement expires in 2013, there will be a significant shortfall in the available supply of enrichment services, and utilities must have access to sufficient supplies to ensure the continued reliable operation of domestic nuclear plants. No full replacement for the enrichment services currently obtained under the HEU Agreement has been identified.

The Government also claims that it relies on USEC "to supply enriched uranium for a variety of military purposes," and that USEC "is the sole

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19 *Ad Hoc Utilities Group v. United States*, No. 06-00229 (Ct. Int'l Trade appeal docketed July 6, 2006) (appealing Commerce determination); *Ad Hoc Utilities Group v. United States*, No. 06-00300 (Ct. Int'l Trade appeal docketed Sept. 6, 2006) (appealing International Trade Commission determination); *Nukem v. United States*, No. 06-00298 (Ct. Int'l Trade appeal docketed Sept. 6, 2006) (appealing International Trade Commission determination). In the proceedings involving Russia – which are not part of the record of this case and not before the Court – there is evidence that Russia's enrichment capacity is already substantially occupied and that in any event, U.S. utilities are already largely committed under long term purchase contracts that extend beyond the expiration of the HEU Agreement. *Uranium from Russia*, USITC Pub. 3872, Inv. No. 731-TA-539-C (Second Review) (Aug. 2006) at 42, 44 (Comm. Lane, dissenting) and II-18, *available at* http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/index_opinions/index.htm#2006.

supplier of the LEU used to fuel the government-owned nuclear reactors that produce tritium," which is used in nuclear weapons. The Government further asserts that USEC supplies enriched uranium for the space program and for submarines and aircraft carriers. Gov't Pet. at 30. However, although the Government is silent on the issue, USEC acknowledges that it does not own the enrichment facility at Paducah. USEC Pet. at 6. Rather, USEC leases the facility from the Government, which operated it for many years (until USEC was privatized in 1998) and is able to do so again.

Moreover, the Department of Energy ("DOE") itself has indicated that it has a major surplus of weapons-grade uranium. On March 12, 2008, DOE issued a press release addressing "the management of [its] excess uranium inventory." DOE stated that it "has a significant inventory of . . . uranium that is excess to U.S. defense needs." DOE also explained that, because the costs of maintaining the inventory are high, it plans to dispose of excess uranium through commercial or other transfers, while still "maintain[ing] sufficient uranium inventories at all times to meet the current and reasonably foreseeable needs."[20]

It therefore appears unlikely that the financial performance of USEC could have any relationship to U.S. national security. Even if it did, the Petitioners' suggestion that the antidumping

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[20] DOE Press Release, DOE Announces Policy for Managing Excess Uranium Inventory, (Mar. 10, 2008), *available at* http://www.energy.gov/news/6069.htm.

statute should be manipulated to assist USEC – a private company – in raising capital in the commercial markets is certainly not a valid justification for certiorari. It is within the power of the U.S. Congress to enact legislation granting USEC a financial subsidy, but that is not a subject within the scope or intent of the antidumping statute.

With regard to energy policy, the Petitioners' assertion that allowing utilities to purchase Russian enrichment services without going through USEC would increase dependence on foreign energy sources is questionable. USEC itself has for many years chosen to commit most of its own output of enrichment services to contracts with foreign utilities, while delivering Russian services to U.S. utilities as a broker. The real threat to U.S. energy policy arises from the increasing costs now faced by utilities resulting from limited supplies of the components and services needed to produce nuclear fuel, and the potential impact of those limited supplies on current plans for construction of the additional nuclear reactors needed to supply America's steeply growing energy needs. In any event, these are the type of policy disputes that this Court is ill-equipped to resolve.

In addition, it should be noted that USEC soon will not be the only source of enrichment services in the United States. The construction of another U.S. enrichment facility by Louisiana Energy Services ("LES") is underway, and it is expected to be operational in 2009. Reflecting the high demand for and limited supply of worldwide

enrichment services capacity, the entire enrichment output of the LES facility for its first ten years of operation is already committed under contracts with utilities. Other new enrichment facilities are in the planning stages. Utilities will continue to purchase significant amounts of enrichment services from U.S. sources, including USEC, under long term contracts.

Perhaps most important, the antidumping statute is an instrument of trade policy with general application to all industries, and not a tool for the implementation of national security or energy policies. There is simply nothing in the Tariff Act of 1930 indicating that Congress intended it to be interpreted in a special manner for purchases of uranium enrichment services. The policy concerns raised by Petitioners are not within the purview of the antidumping law, and do not provide a valid basis for seeking certiorari to this Court.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

- AND -

USEC INC.; AND UNITED STATES ENRICHMENT CORP.,

*Petitioners,*

*v.*

EURODIF, S.A., ET AL.,

*Respondents.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENTS EURODIF, S.A., AREVA NC, AND AREVA NC, INC.

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## QUESTION PRESENTED

Did the court of appeals correctly hold that sales of uranium enrichment services are not sales of "merchandise" within the meaning of the antidumping statute, 19 U.S.C. § 1673?

## CORPORATE DISCLOSURE STATEMENT

This petition is being filed on behalf of Eurodif, S.A., AREVA NC (formerly named Compagnie Générale Des Matières Nucléaires), and AREVA NC, Inc. (formerly named COGEMA, Inc.).

The majority equity interest in Eurodif, S.A. is held by AREVA NC, which wholly owns AREVA NC, Inc. AREVA NC is a subsidiary of AREVA, a French corporation.

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Eurodif, S.A., Areva NC, and Areva NC Inc. (collectively, "Eurodif") respectfully submit this brief in opposition to the petitions for certiorari submitted by USEC Inc., the United States Enrichment Corporation (collectively, "USEC"), and the United States.

## STATEMENT OF THE CASE

1. Eurodif, a French company, enriches uranium for use by electrical utilities. Enrichment of uranium is an intermediate step in the manufacture of uranium fuel rods, which are used in nuclear power facilities to generate electricity.

Before it can be enriched, uranium ore must be mined and purified into $U_3O_8$ ("yellowcake"), and then converted into $UF_6$ ("feed"). Feed uranium has a .711% concentration, or "assay," of the fissionable $U_{235}$ isotope. To make the uranium suitable for use as fuel in a nuclear reactor, it must be enriched until the $U_{235}$ assay reaches a level of 3% to 5%. *See* Gov't Pet. App. 182a.

Uranium enrichment involves separating the feed into two distinct portions: one portion, the low enriched uranium ("LEU"), contains a higher $U_{235}$ assay than the feed; the second, leftover portion ("tails") has a lower assay, typically from .2% to .4%. Nothing is added to feed uranium during the enrichment process; rather, the feed is continuously separated so as to concentrate more of the existing $U_{235}$ in one portion until the desired product and tails assays are achieved. After enrichment, the LEU is delivered to a fabricator, which processes and presses it into pellets that are assembled into fuel rods for use in nuclear reactors. *See* Gov't Pet. App. 182a.

The amount of effort used to separate feed uranium into LEU is measured in "separative work units," or "SWUs." *See* Gov't Pet. App. 183a. As a U.S. Department of Energy regulation observes, SWUs are "the common measure by which uranium enrichment services are sold." 10 C.F.R. § 766.3 (2008). The dispositive question in this case is whether an enricher's sale of SWUs is a sale of services, as the Federal Circuit held, or a sale of merchandise, as petitioners urge.

2. Contracts for the sale of uranium enrichment services are known as "SWU contracts." Under such agreements, utilities supply feed uranium to enrichers and purchase enrichment services, measured in SWUs. Contrary to the Government's suggestion, Gov't Pet. 7, SWU contracts nowhere specify the precise amount of LEU to be delivered. Rather, enrichers' LEU deliveries under SWU contracts depend on the quantity of feed provided by the utility customer and the product and tails assays that the utility specifies. The utility is charged only for the SWUs required for the enrichment. *See* Gov't Pet. App. 183a.

Occasionally, utilities purchase LEU, rather than SWUs, from enrichers. These transactions for enriched uranium product ("EUP") differ from SWU transactions in a fundamental respect: Unlike with SWU contracts, utilities entering into EUP contracts do not commit to provide the feed uranium to the enricher. Thus, under an EUP contract, the enricher, not the utility, is responsible for procuring the uranium, which it then processes into LEU at the desired assay. There is no dispute that a sale pursuant to an EUP contract is a sale of merchandise, *i.e.*, LEU, and thus could potentially

trigger duties under the antidumping statute, 19 U.S.C. § 1673. *See* Gov't Pet. App. 182a-83a.

The price terms in EUP and SWU contracts reflect this essential difference between the two types of agreements. The price paid by a utility in an EUP contract covers not only the value of enrichment (*i.e.*, the value of SWUs), but also the value of the feed uranium supplied by the enricher. *See* Gov't Pet. App. 182a. In a SWU contract, by contrast, the cost or value of uranium plays no part in the price paid by a utility, which price covers exclusively the value of SWUs. *See* Gov't Pet. App. 47a; Gov't Pet. App. 204a-05a. Thus, two utilities that receive the same amount of LEU at the same $U_{235}$ assay, one pursuant to an EUP contract and the other pursuant to a SWU contract, would pay substantially different prices, because those two utilities would be buying different things: One would be buying all of the components of the LEU's value, including the associated uranium itself; the other would be buying only the service of enrichment of its uranium.[1]

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[1] EUP contracts and SWU contracts allocate the significant risk of uranium price fluctuations differently as between utilities and enrichers. In an EUP contract, the enricher bears the risk of price fluctuations, since it must procure the feed uranium and then provide LEU to the utility at an agreed upon price. In a SWU contract, the risk is borne by the utility, since it is responsible for supplying feed uranium to the enricher. The allocation of such risks is an important aspect of any contract involving uranium products, because uranium prices can swing dramatically. For example, between January 2000 and 2007, feed prices rose from under $10/lb. to more than $130/lb., before falling again to less than $80/lb. *See* Ux Current and Historical Price Indicators, *available at* http://www.uxc.com.

3. In December 2000, USEC filed an antidumping duty petition with the Department of Commerce ("Commerce") regarding LEU imported from France. The petition purported to cover transactions pursuant to both EUP contracts and SWU contracts. Eurodif opposed the petition insofar as it covered SWU transactions, on the basis that Commerce could not impose dumping duties on the sale of enrichment services, since the antidumping statute, 19 U.S.C. § 1673, applies only to sales of merchandise.

Relying on both EUP and SWU contracts, Commerce determined that LEU "from France is being sold, or is likely to be sold, in the United States at less than fair value." Gov't Pet. App. 221a. Commerce rejected Eurodif's argument that SWU transactions are sales of services outside the reach of the antidumping law, finding that "trade in goods" occurs "regardless of whether the sale is structured as one of enrichment processing or LEU." Gov't Pet. App. 231a.

Eurodif appealed to the Court of International Trade ("CIT"), which held that "Commerce's decision to treat [SWU] contracts as contracts for sales of a good is neither supported by substantial evidence nor in accordance with law." Gov't Pet. App. 207a. The CIT noted that under Commerce's previous decisions, a subcontractor or "toller" that sells less than the full value of an article, as in a SWU contract, has been treated "as a service provider and not the producer of the good." Gov't Pet. App. 192a. Rejecting "Commerce's claim that the sole difference between [EUP contracts and SWU contracts] is the way such transactions are structured,"

the CIT pointed to "a critical difference between the two transactions: what is purchased." Gov't Pet. App. at 204a. In EUP contracts, the full value of the LEU is purchased, whereas only "enrichment services" are purchased in SWU contracts. Gov't Pet. App. at 204a-05a.

On remand, Commerce adhered to its original determination. *See* Gov't Pet. App. 69a-177a. Eurodif contested the remand determination and the CIT reversed, again holding that Commerce's conclusions "that [EUP contracts] and SWU contracts are equivalent and that the antidumping provisions are applicable to SWU transactions are neither supported by substantial evidence nor in accordance with law." Gov't Pet. App. 67a.

On interlocutory appeal ("*Eurodif I*"), the Federal Circuit affirmed, holding that "the SWU contracts at issue in this case were contracts for the provision of services and not for the sale of goods." Gov't Pet. App. 24a. Rejecting the Government's and USEC's argument that a sale of merchandise occurs because title to the finished LEU is transferred, the court found that "the SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU." Gov't Pet. App. 20a. The court further determined that "nothing in the text of the antidumping statute or its legislative history evidences . . . a Congressional intent to re-characterize contracts like the SWU contracts at issue in this case for the purposes of antidumping investigations." *See* Gov't Pet. App. 23a. The Federal Circuit also noted its earlier decision in *Florida Power*, in which the Government had

successfully argued that SWU contracts are service transactions. After explaining that "*Florida Power* is not binding precedent for this case," the court found "its reasoning and its conclusion persuasive." Gov't Pet. App. 21a.

While the Government's and USEC's rehearing petitions were pending, this Court issued its decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), which held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982. At petitioners' request, the Federal Circuit granted rehearing for the sole purpose of addressing the impact of *Brand X*, and in all other respects affirmed its prior decision. *See* Gov't Pet. App. 30a.

In its decision on rehearing ("*Eurodif II*"), the court again held that SWU contracts are not subject to the antidumping statute. It expressly found that "the antidumping duty statute unambiguously applies to the sale of goods and not services." Gov't Pet. App. 33a. Pointing to the "inescapable conclusion . . . that the enrichers do not 'sell' LEU to utilities pursuant to . . . SWU contracts," the court "reject[ed] Commerce's application of the antidumping duty statute to the SWU contracts." Gov't Pet. App. 33a-34a.

The CIT then remanded to Commerce, with instructions to "explain how its final determination and order on remand has eliminated all SWU transactions,"

as required by *Eurodif I* and *Eurodif II*. Despite the CIT's instruction, Commerce determined that it would not modify the antidumping duty order to exclude future SWU transactions from its scope. Accordingly, the CIT again remanded to Commerce, stating that *Eurodif I* and *II* required that the scope of the order be redrawn. This time, Commerce issued a conforming antidumping order, which the CIT sustained. Gov't Pet. App. 2a-3a.

USEC and the Government appealed to the Federal Circuit regarding the scope of the revised antidumping order. The Federal Circuit dismissed the appeal as unripe. Gov't Pet. App. 1a-7a. These certiorari petitions followed.

## REASONS FOR DENYING THE PETITIONS

Between them, petitioners raise three arguments in support of a writ of certiorari: (1) the Federal Circuit erred by misapplying the settled rules of agency deference established in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) and *Brand X*; (2) the decision below creates a loophole in the antidumping law that other industries could exploit to evade dumping duties; and (3) the decision below will have undesirable consequences for foreign policy and national security. None of these contentions is supportable, and even if they were, none warrants a grant of certiorari.

*First*, the claim that the Federal Circuit misapplied *Chevron* and *Brand X* is nothing more than a request for error correction. Moreover, the decision below was correct on the merits. The antidumping statute unambiguously applies only to sales of merchandise.

SWU transactions are sales of services, not merchandise, because only the service of enrichment, not the LEU itself, is sold. Thus, the court of appeals correctly held that SWU contracts are not subject to the antidumping law.

*Second*, the decision below did not create a loophole in the antidumping statute. The decision precludes the imposition of dumping duties only where there is never a sale of subject merchandise in the United States — a situation unique to the facts of this case. In all other situations, Commerce's "tolling" regulation, 19 C.F.R. § 351.401(h), provides a means for imposing any applicable dumping duties. Under that authority, which is unaffected by the Federal Circuit's decision, the antidumping law is applied to the downstream domestic sale of imported goods that have been improved by a foreign subcontractor. *See* Gov't Pet. App. 188a-207a. There is no downstream sale in this case because the imported material (LEU) is consumed — *i.e.*, used as fuel in a nuclear reactor — without ever being sold. Petitioners have pointed to no instance in which this critical factor (consumption without sale) has been presented before or since in other transactions that have come before Commerce. Thus, petitioners' claim that other industries could structure their contracts like SWU contracts to avoid dumping duties is unsupported: Any applicable dumping duties would be triggered by the first domestic sale of the subject goods.

*Third*, petitioners' arguments that the decision below could undermine the highly enriched uranium

("HEU") agreement[2] between the United States and Russia and other policy objectives should be directed not to this Court, but to Congress and the President. Indeed, Congress is already considering legislation that would dispose of the precise question raised in this case. *See* Gov't Pet. 26. n.4. In any event, the United States has ample authority under existing law to deal with petitioners' expressed concerns regarding Russian LEU imports, without resorting to the antidumping statute.

## I. PETITIONERS' CLAIM THAT THE COURT OF APPEALS MISAPPLIED *CHEVRON* AND *BRAND X* IS NOT CERTWORTHY, AND, REGARDLESS, THE DECISION BELOW WAS CORRECT ON THE MERITS

The Government asks this Court to grant a writ of certiorari because the court below purportedly misapplied the *Chevron* doctrine when it declined to defer to Commerce's determination that SWU contracts are subject to the antidumping law. *See* Gov't Pet. 17. USEC concurs, and further argues — without the support of the Government — that the Federal Circuit misapplied *Brand X* by ostensibly relying on *Florida Power*, an earlier decision also concluding that SWU contracts involve sales of services. USEC Pet. 31.

There is no dispute that the Federal Circuit explicitly considered both *Chevron* and *Brand X* and properly stated the applicable rules of law. Shortly after this Court

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[2] *See* Agreement Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons, U.S.-Russ., Feb 18, 1993, State Dep't No. 93-59, 1993 WL 152921.

issued *Brand X*, the Federal Circuit granted rehearing for the express "purpose of addressing the applicability of" that decision. Gov't Pet. App. 30a. The court held that neither *Chevron* or *Brand X* required judicial deference to Commerce's determination. *See* Gov't Pet. App. 26a ("to the extent the government argues that Commerce is owed deference under *Chevron* . . . , we reject that argument because we find that the plain meaning of the statute is unambiguous"); Gov't Pet. App. 34a ("We conclude that our analysis in this case is consistent with the Supreme Court's holding in [*Brand X*].").

Petitioners point to no issue regarding the law governing deference to agency decision-making that has divided the courts of appeals and needs this Court's review to ensure uniformity of federal law. Even if the court below had misapplied the relevant precedent, such a request for error correction would not be a sufficient ground for a writ of certiorari. *See* Sup. Ct. R. 10.

In any event, the decision below was correct. As the Federal Circuit recognized, "the antidumping duty statute unambiguously applies to the sale of goods and not services." Gov't Pet. App. 33a. The only thing sold in a SWU transaction is SWUs — a measure of the effort expended to enrich uranium. The associated uranium itself — the only "merchandise" involved in the transaction — is *supplied by* the utility; it is not *sold to* the utility. Accordingly, the price term in a SWU contract does not cover the value of uranium; instead, it covers

only SWUs, and is determined on a per-SWU basis. *See* Gov't Pet. App. 204a-05a.

Not surprisingly, the other courts to have considered the question have likewise concluded — with the support of the Government — that SWU contracts are contracts for services, not goods. *See Florida Power*, 307 F.3d at 1371-74; *Barseback Kraft AB v. United States*, 36 Fed. Cl. 691, 705 (1996), *aff'd* 121 F.3d 1475 (Fed. Cir. 1997); *Centerior Serv. Co. v. United States*, No. 95-103c, 1997 U.S. Claims LEXIS 323, at *19 (Fed. Cl. Dec. 29, 1997).[3]

In *Barseback*, the United States successfully maintained on behalf of USEC, which was then government-owned, that the Uniform Commercial Code ("UCC") does not apply to SWU contracts because no sale of goods is involved. *See* 36 Fed. Cl. at 705 ("It is clear . . . that the customers are contracting for services, not goods, from USEC."). Likewise, in *Centerior Service*, the court agreed with the United States that the UCC does not apply to SWU contracts because they "are for uranium enrichment services." 1997 U.S. Claims LEXIS 323, at *19. And in *Florida Power*, the United States successfully argued that SWU transactions are sales of services, and thus not subject to the Contract Disputes Act of 1978, 41 U.S.C. § 602(a). *See* 307 F.3d at 1372.

Advocating the opposite position here, petitioners contend that SWU contracts actually involve sales of

[3] In *Huffman v. Western Nuclear, Inc.*, 486 U.S. 663 (1988), this Court stated that "Congress . . . authorize[d] the AEC to offer *'toll enrichment' services* whereby utilities could obtain unenriched uranium on the open market and have it enriched by the AEC for a fee." *Id.* at 665 (emphasis added).

LEU, just like EUP contracts. They principally rely on two features of a SWU transaction: (1) that the LEU delivered to a utility customer may not have been processed from the same feed material that the utility provided to the enricher; and (2) that upon delivery, title to the LEU is transferred to the utility. *See* Gov't Pet. 19-23; USEC Pet. 26-27.

Neither of these factors can convert a sale of enrichment services into a sale of merchandise. First, all feed uranium has a .711% $U_{235}$ assay, so "the specific feed uranium provided by a utility customer need not be used to produce LEU for that customer." Gov't Pet. App. 184a. But the fungible nature of feed uranium does not change the essential elements of a SWU transaction, including, most importantly, *what* is sold in such transactions: Utility customers provide the raw materials to be enriched, purchase and pay for only the service of enrichment, and receive LEU. The sale is only of the service of enrichment, regardless of whether the same uranium is returned to the utility.

Second, as the Federal Circuit held after reviewing the contracts at issue here, "ownership of either the unenriched uranium or the LEU is not meant to be vested in the enricher during the relevant time periods." Gov't Pet. App. 20a. Rather, the utility retains "title, risk of loss, [and] power to alienate or sell" the feed that it provides. Gov't Pet. App. 184a. Once the enrichment process is complete and the LEU is delivered, the utility holds title to the LEU but no longer keeps title to the associated unenriched feed uranium. This ensures that the utility does not at any one time have title to both

LEU and, separately, the feed that it supplied. The substance of the transaction is plain: the only thing sold to the utility is the enrichment of uranium, not uranium itself.[4]

USEC further contends that the definition of "services" in an entirely different statute, dealing not with import restrictions but with trade negotiations, supports petitioners' view that SWU transactions are sales of merchandise under the antidumping law. *See* USEC Pet. 27-28 (discussing 19 U.S.C. § 2114b). According to USEC, "services" is defined in that provision to include only "traditional services [such] as banking, insurance, and advertising, but . . . not . . . manufacturing or processing." USEC Pet. at 28. The language of the provision itself, however, does not support USEC's interpretation. *See* 19 U.S.C. § 2114b(5) ("'service' . . . includes, but is not limited to, banking, insurance, . . . *construction*") (emphasis added). Moreover, the United States itself has proposed including "services incidental to manufacturing" within the scope of the negotiations on "energy services" in the

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[4] To the extent the Government suggests that a utility's provision of feed uranium to an enricher constitutes consideration for LEU, *see* Gov't Pet. 19-20, it should be noted that Commerce itself recognized the infirmity of this position in its initial dumping determination, *see* Gov't Pet. App. 254a, and that USEC treats feed uranium provided by a utility as the utility's property. *See* Gov't Pet. App. 185a-86a n.5. "The feed uranium does not become an asset of the enricher, nor is it ever reflected as such on the enricher's books and records." Gov't Pet. App. 185a. As the CIT correctly found, "the provision of feed uranium is not treated by the parties as a payment in kind, but the provision of specific material, owned by the customer, to be enriched." Gov't Pet. App. 198a.

World Trade Organization's General Agreement on Trade in Services. *See* Communication from the United States to the Council on Trade in Services, S/CSS/W.24 (Dec. 18 2000), *available at* http://docsonline.wto.org (search doc. no. 00-5556).[5]

Petitioners also argue that because the term "sale" has been broadly construed in other, unrelated statutes, it ought to be given an elastic interpretation in the antidumping law, so as to encompass SWU transactions. Gov't Pet. 24; USEC Pet. 23-27. But as the Federal Circuit previously held when determining that the provision of free samples is not a sale for purposes of the antidumping law, "Congress intended to give the term ['sold'] its ordinary meaning." *NSK Ltd. v. United States*, 115 F.3d 965, 974 (Fed. Cir. 1997).

Moreover, the critical question here is not *whether* there was a sale, but rather *what* was sold. The answer is uranium enrichment, which is a service and not merchandise. This conclusion is confirmed by Commerce's tolling regulation, 19 C.F.R. § 351.401(h), and the agency's own interpretation of the antidumping statute (until this case). *See* Gov't Pet. App. 201a ("if the text of 19 C.F.R. § 351.401(h) and Commerce's prior decisions were applied to the evidence on this record, the SWU contracts would be treated as contracts for the performance of services"). On numerous prior occasions, Commerce has considered tolling arrangements, under which one company provides materials to another for

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[5] *See* Communication from the United States to the Council on Trade in Services, S/CSS/W.24 (Dec. 18 2000), *available at* http://docsonline.wto.org (search doc. no. 00-5556).

processing. The tolling regulation and related decisions establish that "where the price paid for subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping duty law." Gov't Pet. App. 205a-06a. In other words, only a sale reflecting the full value of the merchandise, not the sale of a tolling service applied to that merchandise, can give rise to a dumping analysis. As Commerce itself put it, unless a subcontractor is paid for "the entire value of the subject merchandise," Commerce "do[es] not consider the 'sale' between the subcontractor and . . . contractor to be a sale of subject merchandise at all. . . . It is the contractor's subsequent sale which is the relevant sale because that party owns the merchandise in its entirety . . . ." Gov't Pet. App. 193a-94a.

Finally, petitioners assert that enrichment is a "major manufacturing process" that "adds substantial value" to feed uranium and creates a "new" or "substantially transformed" article in commerce. Gov't Pet. 18; USEC Pet. 26. The same could be said of virtually any tolling arrangement.[6] But the sale of this "manufacturing process" is not a sale of merchandise. The *output* of the enrichment process — whether substantially more valuable or not — is not dispositive

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[6] As the CIT observed, "in earlier cases involving tolling, it has . . . been the toller that created the 'essential character' of the finished good by transforming the raw materials or inputs into the subject merchandise." Gov't Pet. App. 201a. Yet, in those cases, Commerce has treated the toller as a service provider and not a producer of goods for purposes of a dumping analysis. *See* Gov't Pet. App. 201a-202a.

here because that output is not sold in a SWU transaction. Rather, what is sold is the application of a process (enrichment) to raw materials (feed) that the customer provides. That process is a service, not a good, regardless of whether it adds value to or substantially transforms the feed material.

## II. Petitioners Have Not Demonstrated that the Decision Below Will Have any Effect Outside the Unique Context of SWU Contracts

Petitioners ask this Court to review the decision below because it purportedly creates a "potentially gaping loophole" in the antidumping law that other industries could exploit to evade dumping duties. Gov't Pet. 16, 25; *see also* USEC Pet. 32. Even if this Court were to consider departing from its typical practice of waiting to see if "potential" problems in fact materialize before granting certiorari to address them, there is no reason to do so here. The unique nature of SWU transactions and Commerce's consistent application of the antidumping law to sales of merchandise manufactured through tolling arrangements make it all but impossible for the decision below to have such broad ramifications.

SWU transactions are *sui generis* because the imported material (LEU) is consumed in a nuclear reactor, and thus no sale in the United States occurs. Because consumption without sale is not present in other types of transactions, the Federal Circuit's rulings would not shield them from dumping duties. Rather, as noted, under the tolling regulation and related decisions, which are not affected by the decision below, the first

downstream domestic sale of the imported materials, or an article in which those materials were incorporated, would trigger applicable dumping duties.

Thus, the Government is incorrect when it states that if the Federal Circuit's decision is left intact, other industries could readily circumvent the antidumping statute "by supplying iron ore for 'smelting and rolling services'; . . . trees for 'harvesting and milling services'; and . . . silicon for 'processing services.'" Gov't Pet. 25. As soon as the resulting steel, lumber, or semiconductors were sold in the United States, dumping duties could be assessed. *See, e.g., Stainless Steel Wire Rod from Sweden*, 63 Fed. Reg. 40,449 (Dep't of Commerce July 29, 1998) (notice of final determ.) (downstream sale of article, not manufacturing article under tolling arrangement, triggers dumping analysis); *DRAMS from Taiwan*, 64 Fed. Reg. 56,308 (Dep't of Commerce Oct. 19, 1999) (notice of final determ.) (same).[7]

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[7] The tolling regulation and related decisions likewise refute the identical loophole argument made by the Committee to Support U.S. Trade Law's ("CSUSTL") in its *amicus* brief. Without ever acknowledging the preexisting law applying the antidumping statute to sales of merchandise manufactured through tolling arrangements, CSUSTL asserts that the decision below would leave U.S. industries vulnerable to dumped imports of steel, pasta, semiconductors, and other goods, if the relevant contracts were "structured" like SWU contracts. CSUSTL Br. at 8-9. But once any of those materials were sold in the United States, dumping duties could be imposed. *See* Gov't Pet. App. 190a-201a. Indeed, Commerce has already applied the antidumping law to downstream domestic sales of steel, pasta, semiconductors, and other products manufactured by foreign tollers. *See Stainless Steel Wire Rod from Sweden, supra*; *Pasta from Italy*, 63 Fed. Reg. 53,641 (Dep't of Commerce Oct 6, 1998) (Prelim. Results); *DRAMS from Taiwan, supra*.

Petitioners have pointed to no other situation in the five years since the Court of International Trade's decision in this case, and three years since the Federal Circuit's decision — and none in the history of the antidumping law — in which dumping duties were precluded because imported materials were consumed without being sold in the United States. In short, the threatened loophole problem has never materialized and there is no basis for concluding it ever will.

## III. Petitioners' Policy Arguments Are Not Properly Directed to This Court and, In Any Event, Are Unpersuasive

### A. The Nation's Foreign Policy and Security Interests Are Matters for Congress and the President

Petitioners argue that a writ of certiorari should be granted because the decision below ostensibly "threatens to undermine U.S. foreign policy and national security interests" relating to nuclear materials. Gov't Pet. 26; USEC Pet. 32. In particular, petitioners contend that the decision below "threatens the effectiveness of the HEU Agreement" with Russia. Gov't Pet. 28. According to petitioners, the decision gives Russia an incentive to export commercially produced LEU pursuant to SWU contracts, rather than exporting LEU that has been downblended from HEU pursuant to the HEU Agreement. Gov't Pet. 26-30; USEC Pet. 33-35. The Government further states that "[i]f Russia enjoys unfettered access to the market for LEU in the United States," then the U.S. uranium enrichment industry could be weakened, "leav[ing] the Russian Federation

as the predominant supplier of enriched uranium," and "increas[ing] the United States' dependence on foreign energy sources." Gov't Pet. at 31. Additionally, both petitioners argue that the decision below will undermine USEC's financial viability, which they claim is significant because USEC's plants purportedly "employ the only uranium enrichment technologies available to meet U.S. defense needs." USEC Pet. 36; Gov't Pet. 30-31.

Petitioners' policy arguments are not persuasive, *see infra* Point III.B., but whatever their merits, Congress and the Executive, not this Court, are the proper bodies to consider them. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2420 (2007) (whether a statute's "undesirable consequences" warrant a change in law "is a policy debate that belongs in the halls of Congress, not in the hearing room of this Court").

And, indeed, Congress is already considering legislation that would make SWU transactions subject to the antidumping law. *See* H.R. 4929, 110th Cong. (2007); S. 2531, 110th Cong. (2007). USEC's certiorari petition never acknowledges this pending legislation, although USEC is actively lobbying for its enactment. The Government's petition acknowledges the legislation, but observes that "[t]here is no guarantee . . . that [it] will be enacted, much less that it will be enacted in its present form." Gov't Pet. 26 n.4. But uncertainty about whether Congress will act is not a ground for this Court to take on policy-making responsibilities that are properly reserved for the political branches of government.

### B. Petitioners Have Not Established that the Decision Below Compromises the Nation's Foreign Policy or Security Interests

Petitioners' policy arguments fail to establish that the decision below threatens the nation's foreign policy or security interests. Petitioners suggest that the antidumping statute is the only meaningful mechanism for restricting Russian LEU imports. *See* Gov't Pet. 29 ("successful implementation of the HEU Agreement depends in significant part on the government's ability to use the antidumping laws to regulate the entry of LEU"); USEC Pet. 35 ("unless the *Eurodif* loophole is closed Russia will be able to export unlimited quantities of LEU pursuant to SWU transactions"). But that suggestion is wrong. The United States possesses ample authority under existing law to limit or prevent Russian imports of LEU apart from the antidumping statute.

For example, the President has authority to prohibit or restrict such imports under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701 et seq. IEEPA authorizes the President "to deal with" threats "to the national security, foreign policy, or economy of the United States" that originate abroad. 50 U.S.C. § 1701(a) (2000). Where such a threat exists, the President may "regulate, . . . prevent or prohibit, any . . . importation or exportation of . . . any property in which" a foreign national or country has an interest. 50 U.S.C. § 1702(a)(1)(B). President Clinton issued an executive order pursuant to IEEPA in order to ensure "the full implementation of the [HEU] Agreement." *See* Exec. Order No. 13,159, 65 Fed. Reg. 39,279 (June 21, 2000).

That executive order has been renewed each year since it was issued, most recently in June 2007. *See* Notice of President, 72 Fed. Reg. 34,159 (June 19, 2007).

The United States can also restrict Russian LEU imports pursuant to Section 232 of the Trade Expansion Act of 1962, *codified as amended at* 19 U.S.C. § 1862 (2000). That provision directs the Secretary of Commerce to advise the President upon "find[ing] that [any] article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. § 1862(b)(3)(A). If the President concurs in that finding, he or she may "adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii) (2000).

Also unpersuasive is petitioners' argument that the decision below could impair the nation's energy and security interests by jeopardizing USEC's financial viability. Even assuming that USEC's continued existence is in doubt — a factual assertion not supported by evidence in this record — petitioners have not explained why the United States could not meet its needs for nuclear materials without USEC's assistance.

Both the Government and USEC observe that USEC supplies enriched uranium to the United States for military purposes. Gov't Pet. 30; USEC Pet. 36. But the enrichment plant "operated by USEC" is "owned by the U.S. government." USEC Pet. 6. And until the Government's enrichment operation was privatized,

commercial uranium enrichment in the United States was done by the Department of Energy. *See Florida Power & Light Co. v. United States*, 307 F.3d 1364, 1366 (Fed. Cir. 2002) ("The United States government has long performed uranium enrichment for domestic and foreign utility companies."). Thus, petitioners have not shown why USEC's "continued survival is . . . a matter of compelling importance to U.S. national security interests." Gov't Pet. 30.

Nor have petitioners shown that the Government requires additional LEU to meet its nuclear defense needs. As recently as March 12, 2008, the Secretary of Energy issued a Policy Statement addressing "the management of [its] excess uranium inventory." Secretary of Energy's Policy Statement on Management of Excess Uranium Inventory, at 1, *available at* http://www.ne.doe.gov. The statement explains that the Department of Energy "has a significant inventory of . . . uranium that is excess to U.S. defense needs." *Id.* Accordingly, it plans to dispose of excess uranium through commercial or other transfers, while still "maintain[ing] sufficient uranium inventories at all times to meet the current and reasonably foreseeable needs." *Id.* at 2. Moreover, "[o]ver the coming years, the Department expects to downblend most of its excess HEU into LEU," *id.* at 3, meaning that the United States has a source of LEU apart from uranium enrichment.

## CONCLUSION

For the foregoing reasons, this Court should deny the petitions for writs of certiorari to review the judgment of the Federal Circuit.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

USEC INC. and
UNITED STATES ENRICHMENT CORPORATION,

*Petitioners,*

*v.*

EURODIF S.A.; AREVA NC; AREVA NC, INC.;
AD HOC UTILITIES GROUP; and
UNITED STATES OF AMERICA,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## REPLY BRIEF FOR PETITIONERS USEC INC. AND UNITED STATES ENRICHMENT CORPORATION

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## RULE 29.6 STATEMENT

Petitioners' corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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The petitions filed by USEC and the United States raised the question whether the Federal Circuit erroneously failed to accord *Chevron* deference to the Commerce Department's construction of the term "merchandise . . . sold" in the antidumping statute. The petitions also showed why the Federal Circuit's decision, if left standing, will have serious ramifications for other domestic industries and for U.S. national security and energy independence. Respondents Eurodif and the Ad Hoc Utilities Group (AHUG) have failed to show why this case does not merit this Court's review.

## I. THIS CASE RAISES IMPORTANT ISSUES REGARDING THE APPLICATION OF *CHEVRON* AND THE SCOPE OF THE ANTIDUMPING LAW.

The petitions demonstrated that the term "merchandise ... sold" in the antidumping statute is ambiguous, and that the Commerce Department's construction of that term was reasonable and therefore should have been accorded deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984). Respondents' arguments to the contrary simply repeat the interpretive errors of the Federal Circuit.

First, Respondents quote the Federal Circuit's assertion that the antidumping statute "unambiguously" applies to sales of merchandise and not sales of services. Eurodif Br. at 6, 10; AHUG Br. at 13, 17. No one has ever disputed that point. The critical ambiguity lies in what constitutes a sale of merchandise. As USEC noted (USEC Pet. at 23-27), statutory terms like "sale" or "purchase" appear in many regulatory regimes, with

considerable ambiguity. Agencies implementing those regimes have not been hamstrung by the contractual language of the parties or the contention that there is only one possible construction of such terms. Respondents, like the Federal Circuit, miss the flexibility of such language in the regulatory setting, where, as here, the rights of third parties are at stake.

Respondents cite two decisions of the Court of Federal Claims that the Uniform Commercial Code did not apply to Department of Energy SWU contracts. Eurodif Br. at 11; AHUG Br. at 6 n.6. As USEC noted in its petition (USEC Pet. at 30 n.7), decisions applying other statutory regimes cannot determine whether SWU transactions constitute sales of merchandise under the antidumping statute. This Court has recently emphasized that interpretations of terms in a regulatory statute must take into account the objects and purposes of that statute, as Commerce did here. *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1157-58 (2008) (rejecting narrow interpretation of "charge" that would be "in considerable tension with the structure and purposes" of the ADEA in favor of a standard "consistent with the design and purpose of the ADEA"). This critical principle of statutory construction reconciles the varying court and agency views of enrichment contracts, but was ignored by the Federal Circuit and the Respondents.

Eurodif also contends that the key factor that makes SWU transactions not sales of merchandise is that "the price term in a SWU contract does not cover the value of the uranium." Eurodif Br. at 10. This standard for

determining when a sale of merchandise takes place—which differs from the standard applied by the Federal Circuit under *NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997) (*i.e.*, transfer of ownership of LEU and consideration)—only serves to further demonstrate the ambiguity in the phrase "merchandise . . . sold" in the antidumping statute. In any event, Eurodif cites no support for its contention that the price term in the sale of a good must not only constitute consideration, but must reflect both the raw material and manufacturing components. This contention was correctly rejected by Commerce. USEC Pet. at 214a.

The second error made by the Federal Circuit and repeated by Respondents is to insist that the antidumping regime should be held hostage to the contractual terms negotiated by self-interested parties. Commerce's approach was to look at all the facts of record and the reality of the transactions to determine whether merchandise, rather than services, was being sold. The Federal Circuit rejected that approach, concluding that this issue should be resolved only from the intent of the parties as reflected in the language of their contract. As this Court recently made clear, "[w]here ambiguities in statutory analysis *and application* are presented, the agency may choose among reasonable alternatives." *Holowecki*, 128 S. Ct. at 1158 (emphasis added). Commerce's approach here was unquestionably reasonable.

AHUG argues that SWU transactions constitute sales of services because "the contracts make clear that the utilities are *deemed* to receive back their own

uranium." AHUG Br. at 19 (emphasis added).[1] That "legal fiction"—as it was characterized by the Court of International Trade (USEC Pet. at 122a)—is contrary to the reality of a SWU transaction. Accordingly, Commerce declined to give it dispositive weight in determining the application of the antidumping statute. USEC Pet. at 12.

Respondents do not dispute three fundamental facts that characterize SWU transactions: (1) the enricher produces a new and substantially transformed product from commingled and fungible uranium; (2) the LEU is not produced from the uranium supplied by the customer; and (3) from the time of production until final transfer and delivery to a particular customer, no customer can claim ownership of that LEU. *See* USEC Petition at 26. These and the other facts of record—not contested in any way by Respondents—impelled Commerce's conclusion that a transfer of ownership of the LEU occurs. In applying a regulatory statute like the antidumping statute, the reality of a transaction must hold sway over "legal fictions" adopted by the parties for their own purposes.

A clear demonstration that the essence of a SWU transaction is not the performance of a service on the customer's goods lies in the fact that an enricher may

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1. AHUG endeavors to reinforce this fiction by repeatedly stating that enrichers enrich "the" uranium delivered by the customer, thereby suggesting that enrichers are performing a "service" on the customer's goods. *See, e.g.*, AHUG Br. at 2, 4, 10. That is far from the reality of how LEU is produced or delivered, as discussed in Commerce's June 2003 remand determination. USEC Pet. at 217a-223a.

deliver LEU to a utility that the enricher itself did not produce and where the LEU may not have even been produced through an enrichment process. For example, this takes place when USEC delivers LEU produced from dismantled (*i.e.*, down-blended) Soviet weapons in fulfillment of SWU contracts with U.S. utilities. This conclusively demonstrates that the object of a SWU transaction—like an EUP transaction—is the delivery of merchandise (LEU), not the provision of a service on the customer's uranium. *See* USEC Pet. at 6-7.

Respondents argue that Commerce's tolling regulation and certain decisions thereunder are at odds with Commerce's conclusion in this case that LEU imports in SWU transactions are subject to the antidumping law. Contrary to AHUG's characterization (AHUG Br. at 8-9), however, the tolling regulation does not establish a rule as to when sales are within or outside the antidumping law. Rather, it only provides guidance as to which party in a particular tolling transaction—the toller or the tollee—should be selected as a respondent for purposes of determining relevant prices and costs. As recognized by the Court of International Trade, the tolling regulation "does not provide a basis to exclude merchandise from the scope of an investigation." USEC Pet. at 113a-114a.[2] In any event, the tolling regulation was not relied upon in any way by the Federal Circuit and is not pertinent to the issue

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2. Moreover, Commerce fully explained in its June 23, 2003 remand determination why its decision here was not inconsistent with language in previous determinations under the tolling regulation. USEC Pet. at 110a-132a. Respondents do not even cite to this determination, much less refute it.

whether imports of LEU are subject to the antidumping law.[3]

Finally, Respondents fail to address the implications of 19 U.S.C. § 2114b(5) (Congress's definition of "services" as "economic activities whose output are other than tangible goods" discussed in USEC Br. at 27-28). Although this definition is not part of the antidumping law, it demonstrates the reasonableness of Commerce's conclusion that SWU transactions involve the provision and sale of a good, not a service, because enrichment is an economic activity that produces tangible goods that are imported into the United States.[4]

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3. Because the tolling regulation has been misinterpreted by the CIT to permit U.S. purchasers to be treated as foreign producers of the imported merchandise, Commerce has recently announced it is withdrawing the regulation. *See* Withdrawal of Regulations Governing the Treatment of Subcontractors ("Tolling" Operations), 73 Fed. Reg. 16,517 (Mar. 28, 2008).

4. Respondents reference to a December 28, 2000 communication by the United States in the GATS negotiations as suggesting that the United States believes enrichment falls within the services sector (Eurodif Br. at 13-14, AHUG Br. at 18 n.11) fails to note that Annex A to the communication states: "[t]his exercise does not prejudge ... which of these activities fall within the scope of GATS."

## II. THE FEDERAL CIRCUIT'S DECISION CREATES A SIGNIFICANT LOOPHOLE IN THE ANTIDUMPING LAW THAT WILL HARM OTHER DOMESTIC INDUSTRIES.

Respondents claim that the *Eurodif* decision has no impact outside trade in uranium. Eurodif Br. Argument II; AHUG Br. Argument B. They assert that it applies only to the relatively few imported goods that are consumed, and that other imported goods produced through similar contractual arrangements are ultimately resold in transactions that can be captured by the antidumping law. This argument both mischaracterizes the Federal Circuit's holding and grossly understates the significance of the loophole created by the Federal Circuit.

First, the Federal Circuit's holding could not have been clearer:

> We therefore conclude that the SWU contracts at issue in this case were contracts for the provision of services and not for the sale of goods. Accordingly, we find that *the LEU produced as a result of these contracts is not subject to the antidumping statute*. . . .

USEC Pet. at 19a (emphasis added).

Thus, under *Eurodif*, imported goods produced in certain kinds of transactions are not subject to the antidumping statute *at all*. What happens to those goods after importation—whether they are consumed or resold—is irrelevant.

Second, even if the resale of such goods could somehow bring the imports back within the scope of the statute, there are many situations where goods entering the United States are not resold. For example, imported equipment or machine tools may be used in the production of other goods and not resold. Similarly, many imported products are used as material in the production of another good (*e.g.*, auto manufacturers who use imported steel in the production of a car).[5] Thus, Eurodif's claim that enriched uranium is "sui generis" in this regard (Eurodif Br. at 16) badly misses the mark.

Indeed, it is precisely because of the broad effect of the Federal Circuit's decision on other industries that the Committee to Support U.S. Trade Laws and its members have filed an *amicus* brief in this case.

## III. THE FEDERAL CIRCUIT'S RULING WILL HAVE SIGNIFICANT ADVERSE EFFECTS FOR THE NATION'S SECURITY AND ENERGY INDEPENDENCE.

The stakes in this case are high. Respondents' effort to minimize the importance of this case is amply refuted by the fact that the four federal agencies responsible for national security, energy, foreign affairs, and trade issues—the Departments of Defense, Energy, State, and

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5. AHUG cites 19 U.S.C. § 1677a(e) for the proposition that the antidumping statute allows the capture of sales of imported products when the merchandise is incorporated into other products that are sold. This provision, however, allows the capture of such sales only where, unlike here, the transaction is between affiliated parties.

Commerce—have joined with the Solicitor General in urging this Court's review.

Respondents' attempts to downplay the ramifications boils down to an exhortation to let Congress or the President fix the problem. But this hardly suffices. Congress could always undo a court's erroneous interpretation of a statute by passing a new law. But that has not prevented this Court from granting *certiorari* to address a court's important misinterpretations of statutes or its refusal to accord *Chevron* deference to an agency construction of a statute.[6] More fundamentally, the mere fact that a bill has been introduced should not deter this Court from reviewing and correcting the Federal Circuit's misinterpretation of existing law and its failure to apply *Chevron* deference—particularly where, as here, the Federal Circuit's decision may mislead, by erroneous reasoning, future decisions of the Federal Circuit and other courts in dealing with similar *Chevron* issues.

Eurodif also contends (at 20-21) that the President can use his extraordinary powers under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-07, or Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, to counter the national security threats resulting from the decision below. While the President may have the power to declare a national emergency and take action to target Russia under those provisions, such drastic steps against

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6. Legislation to amend the trade laws is always highly controversial. Moreover, in light of the significant lobbying power of AHUG's utility members, who oppose such legislation, the prospect for such legislation is, at best, uncertain.

Russia would almost certainly have serious diplomatic repercussions. In contrast, the 1992 Russian Suspension Agreement has provided a stable, established basis over sixteen years for addressing imports of LEU from Russia on a mutually-agreed basis.

AHUG also speculates that Russia will not abandon its obligations under the 1993 HEU Agreement (AHUG Br. at 25). But such speculation hardly rebuts the considered view of the Executive Branch on Russia's likely reaction. *See* United States Pet. at 26. Russia has in fact suspended shipments on several occasions during the history of the HEU Agreement.[7]

In addition, only 40% of the nuclear arsenal of the former Soviet Union is even covered by the current HEU Agreement. The United States may be interested in extending that Agreement when it expires in 2013 (or negotiating a new one) to cover the balance of those weapons. There will be no economic incentive for Russia to consider such an agreement if it can sell commercially produced LEU to U.S. utilities in transactions that are outside the scope of the antidumping law.

AHUG also claims that if USEC fails some other company could serve as Executive Agent for the United States under the HEU Agreement. AHUG Br. at 25 n.18. But, if the antidumping law is rendered inapplicable to SWU transactions, any other company would face the same economic problem that USEC faces: having to buy

7. For example, Executive Order No. 13,159 cited by Eurodif (at 20-21) was issued to resolve a suspension of shipments by Russia. It provided protection to the Russians against the attachment of their assets related to the HEU Agreement.

down-blended LEU at one price from the Russians and selling it at a lower price in a market depressed by unfairly traded imports.[8]

Similarly, Respondents suggest that the Government could step in and supply the needs of the U.S. military if USEC is forced out of business. Eurodif Br. at 21-22; AHUG Br. at 26-27. But such a nationalization of USEC's operations would fly in the face of Congressional policy reflected in the USEC Privatization Act, Pub. L. No. 104-134, 110 Stat. 1321-35 (1996), that the production of enriched uranium should be placed in the private sector. Moreover, the Government could not take over USEC's operations solely to maintain production of fuel for the military without also reinserting itself in the commercial enrichment market.

AHUG makes vague assertions about a possible lack of LEU supplies after the expiration of the HEU Agreement in 2013. AHUG Br. at 26. However, there are two current projects for deploying new enrichment plants in the United States (*i.e.*, by USEC and Louisiana Energy Services), and other companies (such as General Electric) are considering such projects. These new plants, together with fairly priced future imports, would ensure an adequate supply of LEU. But the economic

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8. AHUG's contention that Russia does not have the capacity to sell substantial additional commercial LEU in the United States (AHUG Br. at 26 n.19) is refuted by findings of the International Trade Commission that "Russia has significant production capacity to make more uranium products for export" and much of its enrichment capacity "would be targeted to the U.S. market." *Uranium from Russia*, USITC Pub. 3872, Inv. No. 731-TA-539-C (Second Review) (Aug. 2006) at 27 & 28.

viability of those projects will be threatened if foreign enriched uranium can be dumped in the United States without any constraints under the trade laws.[9]

Finally, AHUG appears to believe that the economic benefit of allowing the utilities to obtain unfairly priced foreign nuclear fuel is worth the harm that would result to the health and successful expansion of the domestic enrichment industry. However, Congress has rejected that trade-off. The essential premise of the antidumping statute is that the long-term interests of U.S. consumers are better served by assuring that U.S. producers of goods are not injured by unfairly priced imported merchandise. That statutory objective is particularly pertinent here, where the vitality of the domestic enrichment industry is important to national security and energy independence.

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9. Louisiana Energy Services has stated that the loophole created by the *Eurodif* decision "is a matter of extremely serious concern to LES" and that LES's $2 billion investment, as well as future increases in the plant's capacity "could easily be imperiled by unrestrained imports from the Russian Federation." Letter from LES to Assistant Secretary of Commerce David M. Spooner, Inv. No. 821-802 (Jan. 10, 2008). General Electric Company, in a January 9, 2008 filing in that same proceeding, expressed similar concerns that unlimited imports of LEU would constrain its potential investment in a new enrichment technology and plant.

## CONCLUSION

For all of the reasons discussed in USEC's petition and in this reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

*v.*

EURODIF S.A.

*Respondent.*

USEC INC. and
UNITED STATES ENRICHMENT CORPORATION,

*Petitioners,*

*v.*

EURODIF S.A.; COMPAGNIE GENERALE DES MATIERES NUCLEAIRES; COGEMA, INC.; AD HOC UTILITIES GROUP; and UNITED STATES,

*Respondents.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## BRIEF OF THE COMMITTEE TO SUPPORT U.S. TRADE LAWS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICI CURIAE*

The *Amici Curiae* in support of the petitions for writs of certiorari in this case are the Committee to Support U.S. Trade Laws ("CSUSTL") and the following companies and trade associations members of CSUSTL: the American Iron and Steel Institute, the Coalition for Fair Lumber Imports Executive Committee, the Cold Finished Steel Bar Institute, the Copper & Brass Fabricators Council, Inc., Corey Steel Company, the Floral Trade Council, Florida Farmers, Inc., the Kansas Cattlemen's Association, the Lake Carriers Association, Lumi-Lite Candle Co., Inc., the Montana Cattlemen's Association, Nevada Live Stock Association, Nevada Committee for Full Statehood, Nucor Corporation, Steel Manufacturers Association, the Southern Shrimp Alliance, Specialty Steel Industry of North America, R-CALF USA, Republic Engineered Products, South Dakota Stockgrowers Association, and the Timken Company.[1]

In addition to the individual companies and trade associations identified, another member of CSUSTL on whose behalf this brief is submitted is the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International

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[1] The parties have consented to the filing of this brief and their consent letters have been filed with the Clerk. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amici Curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission.

Union ("USW"). The USW is the largest industrial union in North America with 850,000 active members manufacturing a broad range of goods, including tires, steel and pharmaceuticals.

The USW has been actively engaged in using the U.S. trade laws to ensure that its workers and industries are not lost to unfair import competition.[2] The USW firmly believes, as do the other *amici curiae*, that the decision by the Federal Circuit is not only erroneous – elevating form over substance – but outright dangerous because it provides a means for foreign manufacturers to engage in dumping with impunity merely by restructuring contracts. As noted by the Solicitor General, the manufacture of goods typically encompasses manufacturing or processing that could be contracted for separately in the same manner as Separate Work Unit ("SWU") contracts. For example, steel could be obtained by supplying the iron ore and contracting for smelting and rolling "services."[3] The USW and the other

[2] In fact, the USW was a petitioner in the antidumping investigation of uranium products imported from the former Soviet Union, and represents over 1000 highly-skilled workers employed at the United States Enrichment Corporation, the sole U.S. uranium producer. That investigation resulted in a suspension agreement that is now negatively affected by the *Eurodif* decision. The USW is the successor-in-interest in that distinct matter. The original petition was brought by the Oil, Chemical and Atomic Workers International Union ("OCAW") in 1991. In 1999, the OCAW merged with the United Paperworkers International Union to form the Paper, Allied-Industrial, Chemical & Energy Workers International Union ("PACE"). In 2005, PACE merged with the United Steelworkers of America ("USWA") to become the USW.

[3] Petition of Solicitor General for Writ of Certiorari at 25.

*Amici Curiae* stand ready to compete with fairly-traded imports from anywhere but cannot and should not be compelled to compete against dumped imports sold under the guise of "services." That is not what the trade laws intended.

*Amici* are advocates and beneficiaries of the antidumping statute and span a wide array of domestic industries as well as workers. Many of the CSUSTL individual members have filed petitions and successfully secured protection against unfair trade. All of the *Amici Curiae* are concerned that the U.S. antidumping law be maintained as a strong and viable remedial tool to address injurious dumping by imports. As discussed further in the Argument, the interest of *Amici Curiae* in this case stems from the significant loophole in the antidumping law that would result from the Federal Circuit's holding in *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005), *aff'd on reh'g*, 423 F.3d 1275 (Fed. Cir. 2005), *final judgment*, 506 F.3d 1051 (Fed. Cir. 2007). The breadth of the industries and companies that could be affected by the Federal Circuit's holding is expansive.

In sum, CSUSTL and its individual supporting members identified are highly concerned that the effect of the appellate court's holding would essentially permit injurious dumping to continue unchecked, contrary to the purpose of the law. Accordingly, CSUSTL and its individual supporting members have a strong interest in this matter.

## SUMMARY OF ARGUMENT

After conferring with the key Administration agencies involved in international trade and national defense issues and obtaining their support, the Solicitor General has for the first time in history asked the Supreme Court to hear an antidumping case. This request by the Solicitor General demonstrates the significance of the issues raised in the petitions for writs of certiorari and the importance of having the Federal Circuit's decision reviewed and reversed to preserve the efficacy of the U.S. antidumping law.

The appellate court's holding has potentially widespread implications for U.S. industries and workers that rely upon the U.S. antidumping law to obtain relief from injury caused by unfairly traded imports. Where merchandise was manufactured in a foreign country and imported into the United States for sale at a dumped price, causing injury to a competing U.S. industry, the Federal Circuit has held that the antidumping law does not apply because the foreign producer is merely providing a "service" not a "good." The activity of the foreign producer is plainly one of manufacturing with the end result being a finished good rather than a service as that term is traditionally defined (*e.g.*, banking, medical, legal). Based simply on the structure of the contract, the Federal Circuit has determined that parties can avoid the reach of the antidumping laws while still importing dumped goods into the United States. Left unreviewed, this determination presents an enormous loophole to the continued effectiveness of the U.S. antidumping law.

In addition, the Federal Circuit's failure to accord *Chevron* deference to the Commerce Department's reasonable interpretation of the antidumping statute to which it was entitled further warrants the granting of certiorari in this case. Commerce reasonably concluded, taking into account the statute's underlying purpose and the totality of the circumstances, that the antidumping statute encompasses transactions where a U.S. customer provides monetary payments and raw materials to a foreign producer in exchange for the production of a substantially transformed, finished product into the stream of U.S. commerce. The Federal Circuit erred when it applied its own interpretation of the statute, rather than deferring to Commerce as required by the *Chevron* doctrine. Because the Federal Circuit's lack of deference results in a holding that will have serious implications for the international trading system as a whole, the petitions for writs of certiorari should be granted in this case.

## ARGUMENT

### I. THE FEDERAL CIRCUIT'S HOLDING IN *EURODIF* CREATES A MAJOR LOOPHOLE UNDERMINING THE EFFICACY OF THE U.S. ANTIDUMPING LAW

For the first time in the history of the antidumping duty law, the Federal Circuit has held that a foreign producer that manufactures and exports a product to the United States may escape the reach of the U.S. antidumping law based simply on the terms of its contract with the U.S. purchaser. The Federal Circuit's holding has potentially widespread implications for

domestic industries that use the antidumping law to seek relief from injury caused by unfair trading practices of foreign producers. Under the Federal Circuit's holding, foreign producers of goods that are exported to the United States will be able to avoid the reach of the U.S. antidumping law simply by structuring their contracts in the manner used by the French uranium producer. This result elevates form over substance and creates a major loophole to the enforcement of the antidumping law, warranting the grant of certiorari in this case.

The salient facts at issue and errors in the Federal Circuit's determination as applied in the uranium case are set forth in detail in the Petition for a Writ of Certiorari of the Solicitor General as well as in the Petition for Writ of Certiorari submitted by USEC Inc. and United States Enrichment Corporation and will not be repeated here. Of major concern to CSUSTL, as reflected by the filing of this submission, is that the rationale of the Federal Circuit's decision extends well beyond the facts of this uranium case to other U.S. industries and companies. By concluding that contract manufacturing can be used to convert imported merchandise into a "service," the Federal Circuit's holding wrongly treats the sale of an imported good as a service, exposing domestic industries to injury from dumped imports without the remedy of the antidumping law.

Under the Federal Circuit's decision, if a U.S. purchaser supplies or arranges for the supply of raw materials to a foreign manufacturer to be transformed through a manufacturing process into a different product, which is then exported back to the purchaser in the United States, the foreign producer's activities

are considered merely a "service" and not the production of a "good." *Eurodif*, 411 F.3d at 1363-64. The Federal Circuit reached this conclusion based simply on the terms of the contract between the parties and without regard to the extensive manufacturing process undertaken by the foreign producer, the significant value-added by the foreign producer, the substantial transformation that occurred to produce the uranium from the raw material, or the fact that merchandise – not a "service" – was imported into the United States. *Id.* The antidumping statute expressly contemplates that "imports" of "merchandise" will be subject to antidumping duties where dumping occurs. 19 U.S.C. § 1673(1) (2000).[4] The appellate court failed to recognize that, irrespective of the contract terms, the Commerce Department was attempting to impose duties on imports of dumped merchandise as the antidumping law requires.

This broad holding by the Federal Circuit means that even if merchandise is imported as the statute contemplates, the merchandise will not be subject to the law so long as the transaction is structured essentially as a toll processing transaction. A variety of products, including in particular steel and other metal products, chemicals, and textiles, are often sold under toll processing arrangements. In a toll processing sale, the purchaser retains title to the input material and pays the manufacturer to produce and export the finished product from that input. Under the Federal Circuit's holding, structuring a sale as a toll sale would permit the evasion of antidumping duties, creating a serious loophole to the law.

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[4] Unless otherwise indicated, all references to the United States Code are to the 2000 edition.

For example, a foreign brass manufacturer may purchase copper as a raw material input and manufacture that copper into brass sheet and strip for export to the United States. Alternatively, the foreign producer could be provided that same copper by a U.S. customer for manufacture into brass sheet and strip. Notably, the U.S. customer need not physically obtain the input material and transport it to the foreign manufacturer, but may simply structure this transaction so that the customer is the title holder of the copper input product. As a practical matter, under this arrangement, the customer is carrying the finance cost of the work in process that would otherwise be carried by the foreign producer. The foreign manufacturer is engaging in the same production operations and producing the same product, the only difference is that the foreign manufacturer does not finance the raw material costs. This arrangement does not transform the activity of the foreign manufacturer in producing the good into that of providing a service and does not change the fact that merchandise is imported from that foreign producer into the United States.

Similarly, in both scenarios the foreign manufacturer can offer a dumped price for the brass sheet and strip that it is producing and that dumped price can undercut competing U.S. brass producers' prices, causing the U.S. producers to lose sales and profits. By law, material injury to a U.S. industry caused by dumped imports is to be remedied by the imposition of antidumping duties. 19 U.S.C. §§ 1673(1), 1677(7). Under the Federal Circuit's holding, however, if the foreign manufacturer structures the transaction such that the purchaser retains title to the input raw material, it can deliver the finished brass

product at the same injurious, dumped price without any recourse under the antidumping laws by the injured U.S. industry that must compete with these dumped imports. Based on a simple restructuring of the transaction, the Federal Circuit considered the activity to constitute the provision of a "service" rather than the sale of a "good" and, as such, beyond the reach of the antidumping law.

The implications of the Federal Circuit's holding, accordingly, extend far beyond the trade in uranium at issue in this case and implicate all merchandise imports. If ownership of raw materials changes the sale of a finished product from foreign "merchandise" into the sale of a "service," virtually every import transaction involving a manufactured product could be restructured to avoid the application of the antidumping law. In the steel industry, for example, U.S. purchasers could export scrap to China, pay Chinese steel producers to melt the scrap, extrude the steel, hot-roll and cold-roll the steel to produce cold-rolled sheet, and export that cold-rolled sheet back to the United States, claiming all they had provided was a "service" not a good.

Similarly, purchasers of imported pasta could supply wheat to be transformed into pasta; purchasers of semiconductors could supply sand to be processed into semiconductors; and purchasers of bedroom furniture could supply wood to be manufactured into furniture. So long as each of those foreign producers structured the contract so that the purchaser retained title to the input and characterized its role as providing a "service," the overseas manufacturing operations – no matter how significant those operations and no matter that they substantially transformed the raw materials into another

product that was then exported back to the United States – would not be subject to the antidumping law. It should not be the case that merely by structuring the terms of the transaction in a particular manner foreign producers can escape the payment of antidumping duties that would otherwise be owed.

Under the Federal Circuit's holding, the terms of the transaction are the paramount consideration for assessment of whether the antidumping duty law applies to imported goods. If the importer purchased the product under terms of a conventional sales transaction, the product would be subject to the antidumping law. If, however, the sale was structured to be subdivided into separate sales of a raw material input and the processing of that input into a finished product, the same imported good would not be subject to the antidumping law.

Fundamentally, the Federal Circuit has erred by attempting to draw a line between what constitutes a "good" and what constitutes a "service" under the antidumping law on an artificial basis that does not comport with the real world marketplace. There can be no question that the French producer of uranium is engaged in a manufacturing process, that it produces a product or good, and that the good that it produces is exported to and enters the stream of commerce in the United States. Defining this activity as a "service" and finding that there has not been entry of a good into U.S. commerce when the uranium from France is imported into the United States simply does not comport with the facts.

In common parlance, the provision of services is recognized to relate to activities such as professional services (medical, legal, banking), maintenance or repair services or other types of aid that do not result in production of a tangible good.[5] Where a foreign company is engaged in a manufacturing operation whose output is tangible merchandise, that activity should be recognized as the production of a good, not a service. When, in turn, that merchandise or good is exported to the United States and enters U.S. commerce, it should be considered subject to the reach of the antidumping law, regardless of any contractual terms that may be agreed to between the parties.

The broad reach of the Federal Circuit's decision and its potential for undermining the effectiveness of the U.S. antidumping law cannot be overstated. The Federal Circuit has basically provided a roadmap to foreign producers interested in exporting products to the United States at unfair prices as to how their transactions should be structured to avoid antidumping duties. Such a result is not only inconsistent with longstanding agency practice and of significant concern to domestic industries that rely on these unfair trade laws when confronted with injurious, dumped imports, but it also largely eviscerates the purpose of the antidumping law. As the courts have recognized, "the antidumping law is remedial, not

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[5] *See* 19 U.S.C. § 2114b(5) (defining "services" as "economic activities whose outputs are other than tangible goods" such as "banking, insurance, transportation, postal and delivery services, communications and data processing, retail and wholesale trade, advertising, accounting, construction, design and engineering, management consulting, real estate, professional services, entertainment, education, health care, and tourism.").

punitive, and remedial statutes are to be construed broadly." *Bomont Indus. v. United States*, 13 Ct. Int'l Trade 546, 550, 718 F. Supp. 958, 962 (1989) (citing 3 N. Singer, SUTHERLAND STAT. CONST. § 60.01 (4th rev. ed. 1986) and cases cited therein). The purpose of the antidumping law is to "equalize competitive conditions between foreign exporters and domestic industries affected by dumping." *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1379 (Fed. Cir. 2003) (citations omitted). Congress has emphasized that the purpose of the antidumping law is to protect domestic industries from injurious dumping. S. Rep. No. 249, 96th Cong., 1st Sess. 37 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 423; *see also Lasko Metal Prods. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) ("{t}he purpose of the {antidumping law} is to prevent dumping, an activity defined in terms of the marketplace.").

The United States is losing its manufacturing basis due, in significant part, to unfair competition from imported merchandise. The trade remedy laws, including in particular the antidumping laws, are the only defense available to U.S. manufacturers against unfairly traded imports. The loophole to the antidumping law contemplated by the Federal Circuit's decision would severely limit the viability of this remedial tool to domestic industries injured by dumped imports.

It is difficult to reconcile this remedial statutory purpose with the appellate court's decision that would permit injurious dumping of goods to occur unchecked. The intent of Congress in providing remedial relief from the unfair pricing of imported goods must determine whether the law applies to imported merchandise, not

the parties' contractual terms. When the effect on the marketplace is considered in light of the remedial purpose of the statute, the holding of the Federal Circuit cannot be considered anything but a seriously flawed interpretation of the statute that dramatically undermines the very viability of the antidumping law to U.S. industries and warrants review by granting the petitions for certiorari.

## II. THE FEDERAL CIRCUIT FAILED TO ACCORD *CHEVRON* DEFERENCE TO COMMERCE'S REASONABLE INTERPRETATION OF THE ANTIDUMPING STATUTE

The Federal Circuit's failure to follow a fundamental principle established by this Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), provides another reason for granting certiorari in this case. Under the *Chevron* doctrine, courts are to accord deference to reasonable interpretations of a statute adopted by an administrative agency that has been "charged with responsibility for administering the provision." *Id.* at 865. Specifically, in assessing the validity of an agency's statutory interpretation, the courts must apply the following two-part standard:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency,

> must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Id.* at 842-43 (1984) (footnotes omitted). More recently, this Court further explained that deference is appropriate for ambiguous statutes even when a court has previously construed the statute. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.") (emphasis added). Filling "gaps" in ambiguous statutes "involves difficult policy choices that agencies are better equipped to make than courts." *Id.* at 980 (citing *Chevron*, 467 U.S. at 865-866).

To satisfy the *Chevron* standard, the courts must first determine "whether the statute's plain terms 'directly address the precise question at issue.'" *Id.* at 986 (citation omitted). If a "statute is ambiguous on the point," the agency's construction must be given deference if it is "a reasonable policy choice for the

agency to make" and must prevail in such cases, "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Id.* at 980 and 986 (citation omitted).

The Federal Circuit failed to follow the *Chevron* standard in this case. Nothing in the plain language of the antidumping statute suggests that imported goods can evade the reach of the antidumping law based on the structure of the contract. The antidumping law does not define the terms "merchandise" or "sold," and there is no congressional indication that the phrase "foreign merchandise is being, or is likely to be sold" does not encompass transactions where a U.S. customer provides monetary payments and raw materials to a foreign producer in exchange for the production of a substantially transformed, finished product that is imported into the stream of U.S. commerce. 19 U.S.C. § 1673(1). Here, Commerce reasonably concluded, taking into account the statute's underlying purpose and the totality of the circumstances, that products imported under such transactions are "foreign merchandise . . . sold in the United States" within the purview of the antidumping law.

The Federal Circuit determined that Commerce's construction of the statute did not warrant deference under *Chevron* because "the antidumping statute unambiguously applies to the sale of goods and not services." *Eurodif*, 423 F.3d at 1278. This conclusion, however, focuses on the wrong issue. The question is not whether the statute only applies to the sales of goods and not services. Rather, as noted above, the relevant question is what "foreign merchandise is being, or is

likely to be sold" means and whether that phrase encompasses the transactions similar to those at issue in this case. It is precisely on this issue that judicial deference must be accorded to Commerce's construction of the statute.

Commerce's determination that the unfair trade laws must be applicable to imported merchandise produced through contract manufacturing and without regard to how the transactions are structured between the foreign producer and U.S. purchaser is not only proper but is also a reasonable policy choice for the agency to make. Indeed, the failure to adopt Commerce's approach leads to inconsistent treatment under the antidumping law for identical imported merchandise dependent upon the nature of the contract under which the merchandise is imported. Commerce's construction of the statute would preserve the integrity of the antidumping laws by allowing Commerce to fulfill its statutory objective of protecting domestic industries from dumped and injurious imports. Given the underlying statutory purpose, the Federal Circuit erred in refusing to accord deference to Commerce's reasonable policy determination as well.

In addition, the Federal Circuit erred when it relied on its prior holding in *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002), and concluded that a transaction it previously deemed to be a sale of a service under one statute cannot also be a sale of a good under an entirely different statute unless Congress expressly states that it is. *See Eurodif*, 423 F.3d at 1277-78 & n.1. This conclusion is a significant departure from the holding in *Brand X*, which requires

courts to approach its inquiry as if it were "reviewing the agency's construction on a blank slate." *Brand X*, 545 U.S. at 982-83. Because the statute does not compel the court's interpretation, it was improper for the Federal Circuit to not defer to Commerce's reasonable interpretation of the antidumping statute.

In sum, if the Federal Circuit's construction of the antidumping statute is upheld, an enormous loophole in the U.S. trade laws will be created that will encourage foreign producers of all industries to circumvent antidumping laws by structuring their transactions with domestic buyers as contracts for "services." Because of the Federal Circuit's failure to accord deference to Commerce's reasonable construction of the statute and because the Federal Circuit's holding will have serious implications for the international trading system as a whole, the petitions for writs of certiorari should be granted in this case.

## CONCLUSION

For the above-stated reasons, the petitions for writs of certiorari should be granted.

Respectfully submitted,

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101

FILED

JUL 16 2008

OFFICE OF THE CLERK
SUPREME COURT U.S.

Nos. 07-1059 and 07-1078

# In the Supreme Court of the United States

UNITED STATES OF AMERICA

*v.*

EURODIF S.A., ET AL.

USEC, INC., ET AL., PETITIONERS

*v.*

EURODIF S.A., ET AL.

*ON WRITS OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FEDERAL CIRCUIT*

## JOINT APPENDIX

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PETITIONS FOR A WRITS OF CERTIORARI FILED: FEB. 15, 2008
CERTIORARI GRANTED: APR. 21, 2008

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

---

Nos. 2007-1005 and -1006

EURODIF, S.A., COMPAGNIE GENERAL DES MATIERES NUCLEAIRES, AND COGEMA, INC., PLAINTIFFS-APPELLEES, AND AD HOC UTILITIES GROUP, PLAINTIFF-APPELLEE

*v.*

UNITED STATES DEFENDANT-APPELLANT, AND USEC INC. AND UNITED STATES ENRICHMENT CORPORATION, DEFENDANTS-APPELLANTS

---

**DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| 2/2/2007 | Appellant Principal Brief Filing Date |
| | * * * * * |
| 3/19/2007 | Appellee or Cross Appellant Principal Brief Filing Date |
| | * * * * * |
| 4/5/2007 | Appellant Reply Brief Filing Date / / Cross Appellant Reply Brief Filing Date |
| | * * * * * |

| DATE | PROCEEDINGS |
|---|---|
| 4/12/2007 | Appendix Filing Date |
| | * * * * * |
| 7/11/2007 | Oral Argument Date/Calendared |
| | * * * * * |
| 9/21/2007 | Disposition: Dismissed; by Panel |
| | * * * * * |
| 11/13/2007 | Mandated on |

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

---

Nos. 04-1209 and 04-1210

EURODIF S.A., COMPAGNIE GENERALE DES MATIERES NUCLEAIRES, AND COGEMA, INC., PLAINTIFFS-APPELLANTS, AND AD HOC UTILITIES GROUP, PLAINTIFF-APPELLANT

*v.*

UNITED STATES, DEFENDANT-CROSS APPELLANT, AND USEC INC., AND UNITED STATES ENRICHMENT CORPORATION, DEFENDANTS-CROSS APPELLANTS

---

**DOCKET ENTRIES**

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 2/3/2004 | 2 | FORMERLY MISC. NO. 752 (CONSOLIDATED WITH MISC. NO. 753). |
| 2/3/2004 | 3 | NOTICE TO THE USCIT: PETITIONS FOR PERMISSION TO APPEAL WERE GRANTED ON 2/2/04. PLEASE TRANSMIT A CERTIFIED COPY OF THE DOCKET ENTRIES, THE APPEAL INFORMA- |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | TION SHEET, AND PROOF OF PAYMENT OF FILING FEES. SERVICE: by Mail on 2/3/2004 |
| 2/13/2004 | 4 | CERTIFICATE OF INTEREST FOR THE APPELLANT(S), AD HOC UTILITIES GROUP. FILED (02/13/04) |
| 2/13/2004 | 5 | CERTIFICATE OF INTEREST FOR THE APPELLANT(S), COGEMA, INC, EURODIF S.A. FILED (02/13/04). |
| 2/23/2004 | 6 | CERTIFIED LISTS FOR 02-00219 AND 02-00221 RECEIVED FROM THE U.S.C.I.T. PURSUANT TO FCR 5(B). |
| 2/23/2004 | 7 | NOTE TO FILE: THE DUE DATE FOR APPELLANTS' BRIEFS IS RECALCULATED FROM THE DATE OF FILING OF THE CERTIFIED LIST. THE APPELLANTS' BRIEFS ARE DUE 4/23/04. |

* * * * *

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 3/2/2004 | 12 | INTERVENOR'S LTR TO COURT CONFIRMING DUE DATE OF THEIR REPLY TO RESPONSES FILED BY OTHER PARTIES. (NOTED). SERVICE : by Hand on 3/2/2004 |
| | | * * * * * |
| 3/12/2004 | 15 | REPLY ON BEHALF OF URENCO, ET AL TO RESPONSES TO MOTION FOR LEAVE TO INTERVENE. (SENT TO SSA) . SERVICE: by Mail on 3/12/2004 |
| | | * * * * * |
| 5/18/2004 | 25 | REPLY ON BEHALF OF URENCO NEDERLAND B.V., ET AL TO RESPONSES TO MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE. (SENT TO SSA). SERVICE: by Mail on 5/18/2004 |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | * * * * * |
| 3/18/2005 | 35 | NOTICE OF ERRATA FOR THE MARCH 3, 2005 PRECEDENTIAL OPINION. |
| | | * * * * * |
| 6/28/2005 | 52 | CROSS-APPELLANTS' (U.S.E.C.) CITATION PURSUANT TO FED. CIR. R. 28(J). (CIRCULATED) |
| 6/30/2005 | 52 | EURODIF S.A.'S RESPONSE. SERVICE: by Mail on 6/28/2005 |
| 6/29/2005 | 53 | CROSS-APPELLANT'S (U.S.) CITATION PURSUANT TO FED. CIR. R. 28(J). (CIRCULATED). SERVICE: by Mail on 6/29/2005 |
| 9/9/2005 | 54 | PRECEDENTIAL ORDER: THIS ORDER CONSTITUTES THE PANEL'S ACTION IN RESPONSE TO THE PETITIONS FOR REHEARING. BY: MERITS |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | PANEL. JUDGE PROST. SERVICE: by Mail on 9/9/2005 |

UNITED STATES COURT OF
INTERNATIONAL TRADE

No. 02-219

USEC INC. AND UNITED STATES ENRICHMENT CORPORATION, PLAINTIFFS

*v.*

UNITED STATES, DEFENDANT

**DOCKET ENTRIES**

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 03/14/2002 | 1 | Summons. Filed by Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of all plaintiffs. Filing fee collected, receipt # w/finance. (Addison, Valerie) (Entered: 03/29/2002) |
| | * * * * * | |
| 04/15/2002 | 8 | Complaint against United States. Filed by Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Cogema, Inc., Compagnie |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Generale Des Matieres Nucleaires, Eurodif S.A..(Ricci, Rebecca) (Entered: 04/18/2002) |
| | | * * * * * |
| 05/22/2002 | 26 | Order signed on 5/22/2002 granting Motion to intervene. ORDERED: Eurodif, et al is granted Deft-Intvr status (Related Doc # 17 ). (Warner, Scott) (Entered: 05/22/2002) |
| | | * * * * * |
| 05/22/2002 | 27 | Order signed on 5/22/2002 granting Motion to intervene. ORDERED: United States Enrichment Corp & USEC Inc are granted Deft-Intvr status (Related Doc # 12 ). (Warner, Scott) (Entered: 05/22/2002) |
| | | * * * * * |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 06/14/2002 | 30 | Consent Motion for preliminary injunction. Filed by Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif S.A..(Warner, Scott) (Entered: 06/18/2002) |
| | | * * * * * |
| 06/25/2002 | 32 | Order signed on 6/25/2002 granting Motion for preliminary injunction (Related Doc # 30 ). (Warner, Scott) (Entered: 06/25/2002) |
| | | * * * * * |
| 07/29/2002 | 37 | Confidential and Public Administrative record for DOC filed *w/02-00234*. (Warner, Scott) (Entered: 08/06/2002) |
| | | * * * * * |
| | 43 | Motion for judgment on agency record 56.2 *w/02-112*. Response to Dispositive Mo- |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | tion due by 11/26/2002. Filed by Nancy A. Fischer of Shaw Pittman LLP on behalf of Ad Hoc Utilities Group.(Warner, Scott) (Entered: 10/11/2002) |
| | | * * * * * |
| 09/27/2002 | 44 | Confidential Motion for judgment on agency record 56.2 *w/02-112*. Response to Dispositive Motion due by 11/26/2002. Filed by David E. Birenbaum of Fried Frank Harris Shriver & Jacobson, Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Urenco, Inc., Urenco Nederland B.V., Urenco Limited, Urenco Deutschland GMBH, Urenco Capenhurst Ltd., Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif S.A..(Warner, Scott) (Entered: 10/11/2002) |
| | | * * * * * |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 10/01/2002 | 45 | Confidential Motion for judgment on agency record 56.2 *(Corrected) w/02-112*. Response to Dispositive Motion due by 11/26/2002. Filed by David E. Birenbaum of Fried Frank Harris Shriver & Jacobson, Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif S.A., Urenco Capenhurst Ltd., Urenco Deutschland GMBH, Urenco Limited, Urenco Nederland B.V., Urenco, Inc..(Warner, Scott) (Entered: 10/11/2002) |
| | | * * * * * |
| 10/09/2002 | 49 | Confidential Motion for judgment on agency record 56.2. Response to Dispositive Motion due by 12/11/2002. Filed by Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Eurodif S.A..(Warner, Scott) (Entered: 10/16/2002) |
| 10/10/2002 | 50 | Confidential Motion for judgment on agency record 56.2. Response to Dispositive Motion due by 12/11/2002. Filed by Eric C. Emerson of Steptoe & Johnson, LLP on behalf of USEC Inc. (Warner, Scott) (Entered: 10/16/2002) |
| | | * * * * * |
| 10/15/2002 | 51 | Motion for judgment on agency record 56.2. Response to Dispositive Motion due by 12/11/2002. Filed by Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif S.A..(Warner, Scott) (Entered: 10/17/2002) |
| 10/15/2002 | 52 | Confidential Motion for judgment on agency record 56.2 *(Corrected Version)*. Re- |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | sponse to Dispositive Motion due by 12/11/2002. Filed by Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif S.A..(Warner, Scott) (Entered: 10/17/2002) |
| 10/15/2002 | 54 | Confidential Motion for judgment on agency record 56.2 *(Corrected Version)*. Response to Dispositive Motion due by 12/11/2002. Filed by Eric C. Emerson of Steptoe & Johnson, LLP on behalf of USEC Inc., United States Enrichment Corp.. (Warner, Scott) (Entered: 10/22/2002) |
| 10/15/2002 | 53 | Motion for judgment on agency record 56.2. Response to Dispositive Motion due by 12/11/2002. Filed by Eric C. Emerson of Steptoe & Johnson, LLP on behalf of USEC Inc., United States Enrichment Corp.. (Fong, Sam) (Entered: 10/29/2002) |

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| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | * * * * * |
| 11/26/2002 | 58 | Response *in opposition* to motion *56.2 by Eurodif, Cogema, and Urenco. w/02-112* (related to motions(s) 46 ). Replies due by 12/23/2002. Filed by Lucius B. Lau of U.S. Department of Justice on behalf of United States. (Warner, Scott) (Entered: 12/03/2002) |
| 11/26/2002 | 59 | * * * * * |
| 11/26/2002 | 60 | Response *in opposition* to motion *56.2 by Cogema/Urenco and Ad Hoc. w/02-112* (related to motions(s) 46 & 43). Replies due by 12/23/2002. Filed by Sheldon E. Hochberg of Steptoe & Johnson, LLP on behalf of USEC Inc., United States Enrichment Corp.. (Warner, Scott) (Entered: 12/03/2002) |
| 11/26/2002 | 61 | Response *in opposition* to motion *56.2 by Cogema/Urenco and Ad Hoc. w/02-112* (related to motions(s) 44 & |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | 43). Replies due by 12/23/2002. Filed by Sheldon E. Hochberg of Steptoe & Johnson, LLP on behalf of USEC Inc., United States Enrichment Corp.. (Warner, Scott) (Entered: 12/03/2002) |
| | | * * * * * |
| 11/26/2002 | 63 | Response *in opposition* to motion *56.2 by Ad Hoc. w/02-112* (related to motions(s) 43). Replies due by 12/23/2002. Filed by Lucius B. Lau of U.S. Department of Justice on behalf of United States. (Warner, Scott) (Entered: 12/06/2002) |
| | | * * * * * |
| 12/11/2002 | 65 | Response *in opposition* to motion *56.2 by Cogema/ Eurodif & USEC* (related to motions(s) 53 , 51 ). Replies due by 1/9/2003. Filed by Stephen C. Tosini of U.S. Department of Justice on |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | behalf of United States. (Warner, Scott) (Entered: 12/17/2002) |
| 12/11/2002 | 66 | Response *in opposition* to motion *56.2 by Cogema/ Eurodif & USEC (Confidential)* (related to motions(s) 49, 50). Replies due by 1/9/2003. Filed by Stephen C. Tosini of U.S. Department of Justice on behalf of United States.(Warner, Scott) (Entered: 12/17/2002) |
| 12/11/2002 | 68 | Response *in opposition* to motion *56.2 by Cogema/ Eurodif (Confidential)* (related to motions(s) 49 ). Replies due by 1/9/2003. Filed by Eric C. Emerson of Steptoe & Johnson, LLP on behalf of USEC Inc., United States Enrichment Corp.. (Warner, Scott) (Entered: 12/17/2002) |
| 12/11/2002 | 70 | Response *in opposition* to motion *56.2 by USEC (Confidential)* (related to motions(s) 50). Replies due by 1/9/2003. Filed by Stuart Morton Rosen of Weil, |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Gotshal & Manges, LLP on behalf of Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif S.A. (Warner, Scott) (Entered: 12/17/2002) |
| | | * * * * * |
| 12/13/2002 | 67 | Response *in opposition* to motion *56.2 by Cogema/ Eurodif* (related to motions(s) 51 ). Replies due by 1/9/2003. Filed by Eric C. Emerson of Steptoe & Johnson, LLP on behalf of USEC Inc., United States Enrichment Corp.. (Warner, Scott) (Entered: 12/17/2002) |
| 12/13/2002 | 69 | Response *in opposition* to motion *56.2 by USEC.* (related to motions(s) 50 ). Replies due by 1/9/2003. Filed by Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif S.A..(Warner, Scott) (Entered: 12/17/2002) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | * * * * * |
| 12/23/2002 | 71 | Reply *w/02-112* (related to motions(s) 46 ). Filed by David E. Birenbaum, Stuart Morton Rosen of Fried Frank Harris Shriver & Jacobson on behalf of Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif S.A., Urenco Capenhurst Ltd., Urenco Deutschland GMBH, Urenco Limited, Urenco Nederland B.V., Urenco, Inc..(Warner, Scott) (Entered: 01/02/2003) |
| 12/23/2002 | 72 | Reply *w/02-112* (related to motions(s) 43 ). Filed by Nancy A. Fischer of Shaw Pittman LLP on behalf of Ad Hoc Utilities Group.(Warner, Scott) (Entered: 01/02/2003) |
| | | * * * * * |
| 01/09/2003 | 73 | Confidential Reply *brief* (related to motions(s) 50 ). Filed by Eric C. Emerson of Steptoe & Johnson, LLP on be- |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | half of USEC Inc., United States Enrichment Corp.. (Warner, Scott) (Entered: 01/13/2003) |
| 01/09/2003 | 74 | Confidential Reply *brief* (related to motions(s) 49 ). Filed by Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif S.A..(Warner, Scott) (Entered: 01/13/2003) |
| | | * * * * * |
| 01/13/2003 | 75 | Reply *brief* (related to motions(s) 53 ). Filed by Eric C. Emerson of Steptoe & Johnson, LLP on behalf of USEC Inc., United States Enrichment Corp.. (Warner, Scott) (Entered: 01/17/2003) |
| 01/13/2003 | 76 | Reply *brief* (related to motions(s) 51 ). Filed by Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | S.A..(Warner, Scott) (Entered: 01/17/2003) |
| 01/13/2003 | 77 | Joint Appendix *(Confidential) w/02-112*. Filed by David E. Birenbaum of Fried Frank Harris Shriver & Jacobson, Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif S.A., Urenco Capenhurst Ltd., Urenco Deutschland GMBH, Urenco Limited, Urenco Nederland B.V., Urenco, Inc.. (Warner, Scott) (Entered: 01/17/2003) |
| | | * * * * * |
| 01/17/2003 | 78 | Joint Appendix *(Confidential)*. Filed by Eric C. Emerson of Steptoe & Johnson, LLP on behalf of USEC Inc., United States Enrichment Corp.. (Warner, Scott) (Entered: 01/22/2003) |
| | | * * * * * |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 01/24/2003 | 79 | Amended Appendix *(Confidential) w/ 02-112.* Filed by Jay R. Kraemer of Fried Frank Harris Shriver & Jacobson, Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif S.A., Urenco Capenhurst Ltd., Urenco Deutschland GMBH, Urenco Limited, Urenco Nederland B.V., Urenco, Inc.. (Warner, Scott) (Entered: 01/30/2003) |
| | | * * * * * |
| 02/11/2003 | | Oral Argument held on 2/11/03 at 10:00am in USCIT.. (Warner, Scott) (Entered: 02/25/2003) |
| | | * * * * * |
| 03/25/2003 | 90 | Order signed on 3/25/2003, Slip Op.03-34; Public & Confidential Version Issued. Dept. of Commerce's final determinations vacated as |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | unsupported by substantial evidence on the record and not in accordance with law, and remanded to Commerce for reconsideration. Remand results due 75 days from the date of this decision. Parties may file responses within 20 days thereof. Parties may reply to any responses 7 days thereof. AHUG's motion to intervene is GRANTED. w/02-00112. (related document(s) 41 ). (Taronji, Steve) (Entered: 03/25/2003) |
| | | * * * * * |
| 04/02/2003 | 93 | Order signed on 4/2/2003 Order: Ad Hoc's motion to intervene is GRANTED. w/02-112. (Warner, Scott) (Entered: 04/02/2003) |
| | | * * * * * |
| 06/23/2003 | 100 | Confidential and Public Remand results filed by DOC *w/02-112*. (Warner, Scott) (Entered: 06/27/2003) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | * * * * * |
| 07/03/2003 | 102 | Confidential Comments on remand results *w/02-112*. Filed by David E. Birenbaum of Fried Frank Harris Shriver & Jacobson, Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif S.A., Urenco Capenhurst Ltd., Urenco Deutschland GMBH, Urenco Limited, Urenco Nederland B.V., Urenco, Inc.. (Warner, Scott) (Entered: 07/09/2003) |
| 07/03/2003 | 103 | Confidential Comments on remand results *w/02-112*. Filed by Nancy A. Fischer of Shaw Pittman LLP on behalf of Ad Hoc Utilities Group. (Warner, Scott) (Entered: 07/09/2003) |
| 07/03/2003 | 104 | Confidential Comments on remand results *w/02-112*. Filed by Eric C. Emerson of Steptoe & Johnson, LLP on |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | behalf of USEC Inc., United States Enrichment Corp.. (Warner, Scott) (Entered: 07/09/2003) |
| | | * * * * * |
| 07/07/2003 | 106 | Comments on remand results *w/02-112*. Filed by David E. Birenbaum of Fried Frank Harris Shriver & Jacobson, Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif S.A., Urenco Capenhurst Ltd., Urenco Deutschland GMBH, Urenco Limited, Urenco Nederland B.V., Urenco, Inc.. (Warner, Scott) (Entered: 07/09/2003) |
| 07/07/2003 | 107 | Comments on remand results *w/02-112*. Filed by Eric C. Emerson of Steptoe & Johnson, LLP on behalf of USEC Inc., United States Enrichment Corp.. (Warner, Scott) (Entered: 07/09/2003) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 07/07/2003 | 108 | Comments on remand results *w/02-112*. Filed by Nancy A. Fischer of Shaw Pittman LLP on behalf of Ad Hoc Utilities Group. (Warner, Scott) (Entered: 07/10/2003) |
| | | * * * * * |
| 07/09/2003 | 109 | Confidential Comments on remand results *in reply to respondents and AHUG. W/02-112*. Filed by Eric C. Emerson of Steptoe & Johnson, LLP on behalf of USEC Inc., United States Enrichment Corp.. (Warner, Scott) (Entered: 07/15/2003) |
| 07/09/2003 | 110 | Confidential Comments on remand results *in reply. w/02-112*. Filed by Nancy A. Fischer of Shaw Pittman LLP on behalf of Ad Hoc Utilities Group. (Warner, Scott) (Entered: 07/15/2003) |
| 07/09/2003 | 111 | Confidential Comments on remand results *in reply to USEC. w/02-112*. Filed by David E. Birenbaum of Fried |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Frank Harris Shriver & Jacobson, Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Urenco Capenhurst Ltd., Urenco Deutschland GMBH, Urenco Limited, Urenco Nederland B.V., Urenco, Inc.. (Warner, Scott) (Entered: 07/15/2003) |
| 07/09/2003 | 112 | Comments on remand results *in response to parties comments. w/02-112.* Filed by Stephen Carl Tosini of U.S. Department of Justice on behalf of United States. (Warner, Scott) (Entered: 07/15/2003) |
| | | * * * * * |
| 07/11/2003 | 113 | Comments on remand results *in reply to respondents and AHUG. w/02-112.* Filed by Eric C. Emerson of Steptoe & Johnson, LLP on behalf of USEC Inc., United States Enrichment Corp.. |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | (Warner, Scott) (Entered: 07/15/2003) |
| 07/11/2003 | 114 | Comments on remand results *in reply to USEC. w/02-112.* Filed by David E. Birenbaum of Fried Frank Harris Shriver & Jacobson, Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif S.A., Urenco Capenhurst Ltd., Urenco Deutschland GMBH, Urenco Limited, Urenco Nederland B.V., Urenco, Inc.. (Warner, Scott) (Entered: 07/15/2003) |
| 07/11/2003 | 115 | Comments on remand results *in reply. w/02-112.* Filed by Nancy A. Fischer of Shaw Pittman LLP on behalf of Ad Hoc Utilities Group. (Warner, Scott) (Entered: 07/15/2003) |

* * * * *

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 07/16/2003 | 117 | Joint Appendix *(Confidential) for their comments on DOC's remand determination. w/02-112.* Filed by David E. Birenbaum of Fried Frank Harris Shriver & Jacobson, Nancy A. Fischer of Shaw Pittman LLP, Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Ad Hoc Utilities Group, Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif S.A., Urenco Capenhurst Ltd., Urenco Deutschland GMBH, Urenco Limited, Urenco Nederland B.V., Urenco, Inc.. (Warner, Scott) (Entered: 07/18/2003) |
| | | * * * * * |
| 08/01/2003 | 118 | Confidential and Public Administrative record for DOC filed *w/02-112.* (Warner, Scott) (Entered: 08/08/2003) |
| | | * * * * * |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 09/16/2003 | 119 | Order signed on 9/16/2003 Slip Op. 03-121: Commerce's remand determination reversed in part and affirmed in part. The parties are ordered to consult with each other and with the Clerk of the Court and to file a revised scheduling order within 60 days of the date of entry of this opinion. w/02-112. (Warner, Scott) (Entered: 09/16/2003) |
| | | * * * * * |
| 12/02/2003 | 127 | Motion for certification of appealability *w/schedule*. Responses due by 12/16/2003. Filed by Sheldon E. Hochberg of Steptoe & Johnson, LLP, Nancy A. Fischer of Shaw Pittman LLP, Stuart Morton Rosen of Weil, Gotshal & Manges, LLP on behalf of Ad Hoc Utilities Group, Cogema, Inc., Compagnie Generale Des Matieres Nucleaires, Eurodif |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | S.A., USEC Inc., United States Enrichment Corp.. (Warner, Scott) (Entered: 12/03/2003) |
| 12/02/2003 | 128 | Motion for a statement *pursuant to 28 USC 1292(d)(1).* Responses due by 12/16/2003. Filed by Stephen Carl Tosini of U.S. Department of Justice on behalf of United States. (Warner, Scott) (Entered: 12/05/2003) |
| | | * * * * * * * |
| 12/22/2003 | 135 | Order signed on 12/22/2003, Slip Op. 03-170; ORDERED: that the Court finds, pursuant to 28 USC 1292(d), that the Court's decision on the four issues stated above involve controlling questions on the law with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from the Court's decision may materially advance the ultimate termina- |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | tion of this litigation. ORDERED: that 28 USC 1292(d) hereby permits appeal of these issues. (Taronji, Steve). (Entered: 12/23/2003) |
| | | * * * * * |
| 01/16/2004 | 137 | *Deft's* Appeal of *issues cited in Slip Op 03-170* docketed on 1/12/2004 by the CAFC as appeal no. Misc. No. 753. (Warner, Scott) (Entered: 01/16/2004) |
| 01/16/2004 | 138 | *Eurodif, Compagnie, Cogema, USEC Inc., USEC, and AHUG* Appeal of *issues cited in Slip Op 03-170* docketed on 1/12/2004 by the CAFC as appeal no. Misc. No. 752. (Warner, Scott) (Entered: 01/16/2004) |
| | | * * * * * |
| 02/05/2004 | 140 | *Eurodif, Compagnie, Cogema, USEC Inc., USEC, AHUG and Deft's* Appeal of |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | *issues cited in Slip Op 03-170* docketed on 2/3/2004 by the CAFC as appeal no. 04-1209, -1210(previously docketed as Misc. No. 752 and Misc. No. 753). w/schedule (Warner, Scott) (Entered: 02/06/2004) |
| | | * * * * * |
| 03/07/2005 | 147 | CAFC decision in appeal # *04-1209, -1210*. Decision: *Affirmed-in-part and Reversed-in-part* (related document(s) 143 , 137 , 138 , 140 , 141, 142 ). (Warner, Scott) (Entered: 03/08/2005) |
| | | * * * * * |
| 09/19/2005 | 153 | CAFC mandate in appeal # *04-1209, -1210*. Mandate issued on *9/16/2005* (related document(s) 148 , 147 ). (Warner, Scott) (Entered: 09/20/2005) |
| | | * * * * * |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 01/05/2006 | 177 | Order entered on 1/5/2006, Slip Op. 06-2; ORDERED: that this action is remanded to Commerce. Commerce shall file its remand results and serve the parties with the same, by 3/3/2006. Parties may file and serve responses by 3/17/2006 thereafter. Parties may file and serve a reply to any responses by 3/31/2006. ORDERED: that all other actions in Consolidated Court No. 02-00219 before this Court are stayed pending further notice from the Court. (Related Doc # 157 ) (Taronji, Steve). (Entered: 01/05/2006) |
| | | * * * * * |
| 03/03/2006 | 178 | Remand results filed by U.S. Department of Commerce. Filed by Marisa Beth Goldstein of U.S. Department of Commerce on behalf of United States. (Attachments: # |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | 1 Public Remand Results) (Goldstein, Marisa) (Entered: 03/03/2006) |
| | | * * * * * |
| 05/02/2006 | 191 | Confidential and Public Administrative record for DOC filed. (Attachments: # 1 Docs 1-2# 2 Doc 3# 3 Docs 4-5# 4 Doc 6# 5 Docs 7-15# 6 Doc 16# 7 Doc 17# 8 Doc 18) (Warner, Scott) (Entered: 05/08/2006) |
| | | * * * * * |
| 05/18/2006 | 196 | Order entered on 5/18/2006, Slip Op. 06-75; Pltf's motion for remand is Granted. Deft-Intervenor's motion is Denied. Commerce shall have until 6/19/2006 to provide a remand determination. Parties shall submit comments on Commerce's remand determination no later than 6/26/2006 and rebuttal comments no later than 7/7/2006. |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | (related document(s) 157). (Taronji, Steve) (Entered: 05/18/2006) |
| | | * * * * * |
| 06/19/2006 | 197 | Public Remand results filed by Department of Commerce. Filed by Quentin Michael Baird of U.S. Department of Commerce on behalf of United States. (Attachments: # 1)(Baird, Quentin) (Entered: 06/19/2006) |
| | | * * * * * |
| 07/11/2006 | 208 | Administrative record for DOC filed *(cover letter & index)*. (Attachments: # 1 Docs 1-3# 2 Doc 4# 3 Docs 5-6) (Warner, Scott) (Entered: 07/14/2006) |
| | | * * * * * |
| 08/03/2006 | 213 | Order entered on 8/3/2006, Slip Op. 06-124. Judgment Order issued. ORDERED: |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | that the Department of Commerce's remand determination is sustained. (related document(s) 197 ) .(Goell, Geoffrey) (Entered: 08/03/2006) |
| | | * * * * * |
| 09/18/2006 | 216 | Notice of appeal of Slip Op. 06-124 filed. $455.00 filing fee paid.(related document(s) 213 , 213 ). Filed by Eric C. Emerson of Steptoe & Johnson, LLP on behalf of United States Enrichment Corp., USEC Inc.. (Warner, Scott) (Entered: 09/25/2006) |
| | | * * * * * |
| 09/28/2006 | 218 | Notice of appeal of Slip Op. 06-124 filed. (related document(s) 213 ). Filed by Stephen Carl Tosini of U.S. Department of Justice on behalf of United States.(Warner, Scott) (Entered: 10/02/2006) |
| | | * * * * * |

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**BUSINESS PROPRIETARY VERSION**

Investigation Nos.: A-427-818, C-427-819, A-412-820, C-412-821, A-428-828, C-428-829, A-421-808, C-421-809 and 731-TA.___

* * * * *

**Document may be released under APO**

December 7, 2000

**VIA HAND DELIVERY**

The Honorable Norman Y. Mineta
Secretary of Commerce
Attn: Import Administration
U.S. Department of Commerce, Room 1870
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

The Honorable Donna R. Koehnke
Secretary
U.S. International Trade Commission
500 E Street, S.W.
Washington, DC 20436

**Re: Petition for the Imposition of Antidumping And Countervailing Duties On Low Enriched Uranium From France, Germany, the Netherlands and the United Kingdom**

Dear Secretary Mineta and Secretary Koehnke:

On behalf of USEC Inc., and it's [*sic*] wholly owned subsidiary United States Enrichment Corporation, domestic producers of low enriched uranium, ("Petitioner"), we hereby submit the * * *.

* * * * *

3. General Description of the Merchandise

   a. Physical Characteristics & Identification of Domestic Like Product (19 C.F.R. § 207.11(b)(2)(i))

The subject merchandise is LEU, as defined in Section I.E.1, *supra*. The domestic like product is also LEU, which is identical to the subject merchandise in terms of its physical characteristics and uses. The domestic like product and the subject merchandise are chemically and physically identical and have the same use, namely, as fuel for the production of electric power in nuclear reactors. As noted above in Section I.C., *supra*. Petitioner is the only domestic producer of LEU.

b. Manufacturing Process

LEU is the result of three distinct stages of production—mining, conversion and enrichment—each of which requires specialized equipment, workers and technology.

The first stage is mining. Conventional mining involves the extraction of uranium from open-pit and underground mines. After the uranium is extracted, it is "milled," a term which comprises the entire mechanical and chemical process from the crushing and grinding of the ore to the precipitation of marketable uranium concentrate. Unconventional uranium mining includes techniques such as in-situ leaching, in which uranium is extracted from base materials through the use of chemical reactants. The end-product of conventional and unconventional mining operations is uranium concentrate, a chemically stable uranium oxide which is usually stored and shipped in 55-gallon steel drums. The chemical content of uranium concentrate varies, but is typically at least 75 percent $U_3O_8$, and is usually expressed in terms of $U_3O_8$ equivalent. The product resulting from this stage of production is referred to herein as "natural uranium."

The second stage is conversion, through which uranium concentrates are converted into uranium hexafluoride ($UF_6$). Conversion is accomplished through the addition of heat and chemical reactants, including flourine [*sic*], to the uranium concentrate to produce $UF_6$. The resulting $UF_6$ is stored and shipped in heavy walled steel cylinders because of its highly chemically reactive nature. The product resulting from this stage of production is referred to herein as "converted uranium."

The third stage is enrichment, the process by which the $U^{235}$ isotope in converted uranium is increased to a desired level.[5] As found in nature, uranium consists of three isotopes, the two principal ones being uranium-235 ($U^{235}$) and uranium-238 ($U^{238}$). $U^{238}$ is more abundant but is not fissionable. $U^{235}$ is the fissionable isotope, but its concentration in natural uranium is only 0.711 percent by weight. Most nuclear utilities operating in the world today require LEU fuel with a $U^{235}$ concentration (a "product assay") in the range of 3 to 5 percent by weight.[6]

In a plant based on either of the two commercially established enrichment technologies (described below), the enricher will increase the $U^{235}$ isotope to this desired assay. The amount of isotope separation assumed to be embodied in a given quantity of LEU is expressed in units called "separative work units," or SWU.[7] The amount of SWU deemed to be contained in a given quantity of LEU depends not only on the product assay requested by the utility, but also on the "tails assay" (*i.e.*,

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[5] Depleted uranium (*i.e.*, uranium with an assay of less than 0.711) may also be used as feedstock for production of LEU. LEU produced from depleted uranium (or any other form of uranium) is within the scope of this petition.

[6] HEU, with a $U^{235}$ content greater than 20 percent, has primarily military or research applications.

[7] For reasons stated in the attached memorandum, this quantity of SWU is calculated using a mathematical formula derived from the physics of enrichment that is applied regardless of the technology used. The amount of SWU as calculated in connection with any contract does not necessarily represent the actual amount of separative effort expended by the enricher to produce the LEU. The actual effort (or amount of SWU applied) will be a function of the tails assay of the depleted uranium produced as well as the quantity and assay of the LEU. By industry convention, the phrase "MTSWU" means "thousand SWU."

the percentage of $U^{235}$ assumed to remain in the depleted $UF_6$ after enrichment is complete). Both of these assays are usually stipulated in the contract or purchase order between the enricher and the utility. The product resulting from this stage of production is referred to herein as "low enriched uranium" or "LEU," and constitutes the merchandise subject to this petition.

There are two principal methods of uranium enrichment: gaseous diffusion enrichment and gas centrifuge enrichment.[8] Gaseous diffusion—which until about 1975 was the only Western enrichment technology developed on a commercial scale—involves the passage of $UF_6$ in a gaseous form through a series of barriers containing millions of microscopic holes. Because $U^{235}$ is lighter than $U^{238}$, the $U^{235}$ passes through the barriers more readily than the $U^{238}$, resulting in uranium in a gaseous form that is enriched in $U^{235}$ above the normal concentration. Because a single pass of the $UF_6$ through these barriers has only a slight impact on the $U^{235}$ concentration, the $UF_6$ is sent through hundreds and thousands of barriers, or "cascades" until the desired assay is reached. The gas centrifuge method of enrichment employs rapidly spinning cylinders containing $UF_6$ under high pressure to separate the $U^{235}$ (which, being a lighter isotope, moves at a greater velocity in the centrifuge) from the $U^{238}$. Regardless of the technology used, the enriched $UF_6$ that results from either process is chemically and functionally identical.

In terms of relative value, Petitioner estimates that in a given quantity of LEU, natural uranium accounts for 35 percent of total value, conversion accounts for 5

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[8] LEU can also be produced by downblending HEU.

percent, and enrichment accounts for the remaining 60 percent.[9]

4. Uses

The principal use of LEU is for the generation of electricity. LEU is purchased by U.S. utilities (in the manner discussed in Section I.E.5., *infra*) for fabrication and manufacture into fuel assemblies, which are used as fuel for nuclear reactors in the production of electricity. LEU can also be used in certain medical and research fields.

This petition covers all LEU regardless of end use.

5. Market Characteristics[10]

U.S. utilities can purchase LEU from an enricher entirely for cash, or by paying cash for the SWU deemed to be contained in the LEU and providing the enricher with a quantity of converted uranium as compensation for the quantity of converted uranium deemed to be contained in the LEU.

* * * * *

8. Price

LEU is priced separately from all other products and is traded as a unique item. LEU is either priced on a per kilogram basis (when purchased through an all cash transaction) *or* on a per SWU basis (when purchased on the basis of a cash payment for the calculated SWU component of the LEU delivered by the enricher and deliv-

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[9] *Uranium from Kazakhstan*, Inv. No. 731-TA-539-A, USITC Pub. No. 3213 at I-4 to I-5 (July 1999).

[10] The discussion in this section is based on Petitioner's commercial experience as an enricher of uranium.

ery of the calculated converted uranium component, as required by the contract).

F. Name of Home Market Country and the Name of Any Intermediate Countries Through Which the Merchandise is Transshipped (19 C.F.R. § 351.202(b)(6))

The LEU subject to this petition is produced in France, Germany, the Netherlands, and the United Kingdom. Petitioner has no reason to believe that the subject merchandise is exported from countries other than from those in which it was produced.

G. Names and Addresses of the Companies Producing the Subject Merchandise (19 C.F.R. §§ 351.202(b)(7)(i)(A) & 351.202(b)(7)(ii)(A))

The following are the names and addresses of the producers of the subject merchandise in each of the countries subject to investigation:

France

Eurodif S.A.
4, rue Paul Dautier, BP 35
F-78140 Velizy-Villacoublay Cedex
France

**Energy Information Administration**
**Uranium Industry Annual Survey 1998**

**Table 25. U.S. Utility Purchases of Enrichment Services by Origin Country and Delivery Year, 1994-1998**
(Thousand Separative Work Units (SWU))

| Actual Deliveries | 1994 | 1995 | 1996 | 1997 | 1998 |
|---|---|---|---|---|---|
| **Country where Enrichment Service was performed:** | | | | | |
| China | 237 | 0 | W | W | W |
| France | 549 | 867 | 1,507 | 734 | 696 |
| Germany | W | W | W | W | W |
| Netherlands | W | W | 167 | 0 | 323 |
| Russia | 421 | 1,108 | 1,073 | 1,765 | 2,364 |
| United Kingdom | W | 460 | 278 | 119 | 376 |
| **Foreign Total** | **1,676** | **2,800** | **3,154** | **2,865** | **4,401** |
| United States | 7,521 | 6,741 | 8,004 | 6,013 | 5,677 |
| **Total** | **9,167** | **9,540** | **11,159** | **8,876** | **10,079** |

W = Data withheld to avoid disclosure.

Note: Totals may not equal sum of components because of independent rounding.

Source: Energy Information Administration, Form EIA-858, "Uranium Industry Annual Survey" (1994-1998).

**Table 26. U.S. Utility Purchases of Enrichment Services by Contract Type in Delivery Year, 1998**
(Thousand Separative Work Units (SWU))

| Enrichment Service Contract Type | U.S. Enrichment | Foreign Enrichment | Total |
|---|---|---|---|
| Spot | W | W | W |
| Short-term | W | W | W |
| Medium-term | 1,796 | 1,089 | 2,885 |
| Long-term | 3,598 | 3,151 | 6,748 |
| **Total** | **5,677** | **4,401** | **10,079** |

Note: Totals may not equal sum of components because of independent rounding.

Source: Energy Information Administration, Form EIA-858, "Uranium Industry Annual Survey" (1998).

**Table 27. Uranium in Fuel Assemblies Loaded into U.S. Commercial Nuclear Power Reactors by Year, 1994-1998**

(Thousand Pounds $U_3O_8$ Equivalent)

| Origin of Uranium | 1994 | 1995 | 1996 | 1997 | 1998[P] |
|---|---|---|---|---|---|
| Domestic-Origin Uranium ..... | 9,302 | 11,146 | 8,820 | 11,135 | 7,386 |
| Foreign-Origin Uranium | 31,098 | 39,972 | 37,330 | 37,069 | 30,918 |
| **Total .....** | **40,400** | **51,118** | **46,151** | **48,204** | **38,304** |

P = Preliminary data. Final 1997 fuel assembly data reported in the 1998 survey.

Notes: Includes only unirradiated uranium in new fuel assemblies loaded into reactors during the year. Does not include uranium removed from reactors *that subsequently will be reloaded. Totals may not equal sum of components because of independent rounding.*

Source: Energy Information Administration, Form EIA-858, "Uranium Industry Annual Survey" (1994-1998).

**Table 25. U.S. Utility Purchases of Enrichment Services by Origin Country and Delivery Year, 1995-1999**
(Thousand Separative Work Units (SWU))

| Actual Deliveries | 1995 | 1996 | 1997 | 1998 | 1999 |
|---|---|---|---|---|---|
| **Country where Enrichment Service was performed:** | | | | | |
| China | 0 | W | W | W | 145 |
| France | 867 | 1,507 | 734 | 696 | 822 |
| Germany | W | W | W | W | 302 |
| Netherlands | W | 167 | 0 | 323 | 245 |
| Russia | 1,108 | 1,073 | 1,765 | 2,364 | 3,424 |
| United Kingdom | 460 | 278 | 119 | 376 | 487 |
| **Foreign Total** | **2,800** | **3,154** | **2,865** | **4,401** | **5,425** |
| United States | 6,741 | 8,004 | 6,013 | 5,677 | 4,602 |
| **Total** | **9,540** | **11,159** | **8,876** | **10,079** | **10,028** |

W = Data withheld to avoid disclosure.

Note: Totals may not equal sum of components because of independent rounding.

Source: Energy Information Administration, Form EIA-858, "Uranium Industry Annual Survey" (1995-1999).

**Table 26. U.S. Utility Purchases of Enrichment Services by Contract Type in Delivery Year, 1999**
(Thousand Separative Work Units (SWU))

| Enrichment Service Contract Type | U.S. Enrich-ment | Foreign Enrich-ment | Total |
|---|---|---|---|
| Spot | 210 | 379 | 588 |
| Short-term | W | W | W |
| Medium-term | W | W | W |
| Long-term | 3,983 | 4,240 | 8,223 |
| **Total** | **4,602** | **5,425** | **10,028** |

W = Data withheld to avoid disclosure.

Note: Totals may not equal sum of components because of independent rounding.

Source: Energy Information Administration, Form EIA-858, "Uranium Industry Annual Survey" (1999).

**Table 27. Uranium in Fuel Assemblies Loaded into U.S. Commercial Nuclear Power Reactors by Year, 1995-1999**

(Thousand Pounds $U_3O_8$ Equivalent)

| Origin of Uranium | 1995 | 1996 | 1997 | 1998 | 1999[P] |
|---|---|---|---|---|---|
| Domestic-Origin Uranium ..... | 11,146 | 8,820 | 11,135 | 7,388 | 10,583 |
| Foreign-Origin Uranium | 39,972 | 37,330 | 37,069 | 30,811 | 48,244 |
| **Total .....** | **51,118** | **46,151** | **48,204** | **38,199** | **58,827** |

P = Preliminary data. Final 1998 fuel assembly data reported in the 1999 survey.

Notes: Includes only unirradiated uranium in new fuel assemblies loaded into reactors during the year. Does not include uranium removed from reactors that subsequently will be reloaded. Totals may not equal sum of components because of independent rounding.

Source: Energy Information Administration, Form EIA-858, "Uranium Industry Annual Survey" (1996-1999).

[Logo Omitted]
USEC

**MEETING CHALLENGES
SEIZING OPPORTUNITIES**

2000 ANNUAL REPORT

[Illustration Omitted]

## MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

The following discussion should be read in conjunction with, and is qualified in its entirety by reference to, the Consolidated Financial Statements and related notes appearing elsewhere in this report.

### OVERVIEW

USEC, a global energy company, is the world leader in the sale of uranium fuel enrichment services for commercial nuclear power plants, with approximately 73% of the North American market and approximately 36% of the world market. Uranium enrichment is a critical step in transforming uranium into fuel for nuclear reactors to produce electricity. Based on customers' estimates of their requirements and certain other assumptions, including estimates of inflation rates, at June 30, 2000, USEC had long-term requirements contracts with utilities to provide uranium and uranium enrichment services aggregating $6.1 billion through fiscal 2011 (including $3.3 billion through fiscal 2003), compared with $6.5 billion at June 30, 1999. The standard measure of

effort or service in the uranium enrichment industry is separative work units ("SWU").

Agreements with electric utilities are generally long-term requirements contracts under which customers are obligated to purchase a specified percentage of their requirements for uranium enrichment services. Customers, however, are not obligated to make purchases or payments if they do not have any requirements. There is a trend for contracts with shorter terms that is expected to continue, with the newer contracts generally containing terms in the range of 3 to 7 years. Under power-for-SWU barter contracts, USEC exchanges its enrichment services with utilities that supply electric power to the plants.

Revenue and operating results can fluctuate significantly from quarter to quarter, and in some cases, year to year. Customer requirements are determined by refueling schedules for nuclear reactors, which generally range from 12 to 24 months. These schedules are in turn affected by, among other things, the seasonal nature of electricity demand, reactor maintenance, and reactors beginning or terminating operations. Utilities typically schedule the shutdown of their reactors for refueling to coincide with the low electricity demand periods of spring and fall. Thus, some reactors are scheduled for fall refueling, spring refueling or for 18-month cycles alternating between both seasons. The timing of larger orders for initial core requirements for new nuclear reactors also can affect operating results.

USEC is the Executive Agent of the U.S. Government under a government-to-government agreement ("Russian Contract") to purchase the SWU component of en-

riched uranium recovered from dismantled nuclear weapons from the former Soviet Union for use in commercial electricity production. Cost of sales has been, and will continue to be, adversely affected by amounts paid to purchase SWU under the Russian Contract. Since the volume of Russian SWU purchases has increased, USEC has operated the plants at significantly lower production levels resulting in higher unit production costs. Global market prices for SWU have declined below the price being paid for SWU under the Russian Contract. An underlying principle of the program is for it to operate according to commercial practices. As a result of negotiations to align the Russian Contract with market pricing realities, USEC and its counterparts in Russia have reached an agreement in principle to adopt market-based pricing for SWU in January 2002, subject to approvals from the United States and Russian governments. The timing and conditions, if any, for U.S. government approval are uncertain.

**REVENUE**

Substantially all of USEC's revenue is derived from the sale of uranium enrichment services, denominated in SWU. Although customers may buy enriched uranium product without supplying uranium, most of USEC's contracts are for enriching uranium provided by customers. Because orders for uranium enrichment services to refuel customer reactors occur once in 12, 18 or 24 months and are large in amount, averaging $13.0 million per order, the percentage of revenue attributable to any customer or group of customers from a particular geographic region can vary significantly quarter-by-quarter or year-by-year. However, customer requirements and orders over the longer term are more predictable.

USEC estimates that about two-thirds of the nuclear reactors under contract operate on refueling cycles of 18 months or less, and the remaining one-third operate on refueling cycles greater than 18 months.

Recent industry and global economic developments have intensified the effects of production over-capacity and continuing lower prices for SWU. These developments include:

- heightened price competition among uranium enrichment suppliers;
- the adverse impact of the strengthening U.S. dollar;
- certain European utilities liquidating strategic SWU inventories; and
- termination of the Kazakhstan suspension agreement.

In addition to excess production capacity, certain suppliers have announced technology-driven plans to expand capacities.

USEC's financial performance overtime can be significantly affected by changes in hte market prices for SWU. As older contracts expire, USEC's backlog is becoming more heavily weighted with newer contracts with shorter terms and lower prices. In light of this, USEC expects its backlog will decline over time unless new SWU commitments are added at sufficient levels to offset the impact of shorter term contracts, expiring commitments and lower prices. USEC anticipates the trend toward lower prices and shorter contract terms will continue, due to increased competition among uranium enrichment suppliers for new SWU commitments. To address this trend, USEC is placing a high priority

on numerous initiatives to further reduce costs and increase its competitiveness.

USEC's contracts are denominated in U.S. dollars, and although revenue is not directly affected by changes in the foreign exchange rate of the U.S. dollar, USEC may have a competitive price disadvantage or advantage obtaining new contracts in a competitive bidding process depending upon the strength or weakness of the U.S. dollar. Costs of the primary competitors are denominated in the major European currencies.

Revenue could be negatively impacted by actions of the Nuclear Regulatory Commission suspending operations at domestic utility customer reactors under contract with USEC. In addition, business decisions by utilities that take into account economic factors, such as the price and availability of alternate fossil fuels, consolidation within the electric power industry, the need for generating capacity and the cost of maintenance, could result in suspended operations or early shutdowns of some reactors under contract with USEC.

**COST OF SALES**

Cost of sales is based on the quantity of SWU sold during the period and is dependent upon production costs at the plants and purchase costs under the Russian Contract. Production costs consist principally of electric power (representing 50% of production costs in fiscal 2000), labor and benefits, depleted uranium disposition costs, materials, and maintenance and repairs. Under the monthly moving average inventory cost method, an increase or decrease in production or purchase costs will have an effect on costs of sales over future periods.

The plants require substantial amounts of electric power to enrich uranium. In fiscal 2000, USEC acquired most of its electric power from Ohio Valley Electric Corporation ("OVEC"), the main supplier to the Portsmouth plant, and from Electric Energy, Inc. ("EEI"), the main supplier to the Paducah plant, under long-term power purchase contracts between DOE and OVEC and EEI. Under an agreement between USEC and DOE ("Electricity MOA"), DOE is required to transfer the benefits of the power purchase contracts to USEC.

Electric power purchased from OVEC and EEI represented 75% of power purchased in fiscal 2000, with costs based on actual costs incurred by OVEC and EEI. The remainder of the electric power purchased by USEC in fiscal 2000 was market-based power, all of which was used at the Paducah plant. Market-based power costs vary seasonally with rates higher during the winter and summer as a function of the extremity of the weather. USEC substantially reduces production and the related power load at the Paducah plant in the summer months when the cost of market-based power is high. Almost all of the power for the Paducah plant for the summer of 2000 was purchased prior to the summer months at fixed prices based on prevailing market rates.

In July 2000, USEC entered into a 10-year power purchase agreement with Tennessee Valley Authority ("TVA") to provide a substantial portion of electric power for the Paducah plant beginning September 2000. Replacing EEI as primary supplier, TVA will supply electric power for the Paducah plant at fixed rates, thereby substantially reducing USEC's price risk for electric power in the volatile Midwest power market. The agreement provides that amounts to be paid to TVA

for power scheduled to be purchased in fiscal 2001 will be reduced by a deferred payment obligation of $45.0 million. USEC will secure the obligation, as long as it is outstanding, by transferring title to uranium inventories with an equivalent value to TVA. The obligation and related interest will be satisfied by providing SWU to TVA in fiscal years 2002 to 2004 under a requirements contract, the terms of which are not yet final.

USEC accrues estimated costs for the future disposition of depleted uranium generated as a result of its operations. Costs are dependent upon the volume of depleted uranium generated and estimated transportation, conversion and disposal costs. USEC stores depleted uranium at the plants and continues to evaluate various proposals for its disposition.

USEC leases most, but not all, of the buildings and facilities at the plants at favorable terms from DOE. Upon termination of the lease, USEC is responsible for certain lease turnover activities at the plants. Lease turnover costs are accrued over the estimated term of the lease which, for the Paducah plant, is estimated to extend through calendar year 2008.

As Executive Agent under the Russian Contract, USEC ordered 5.5 million SWU in fiscal 2000. However, as a result of shipping delays in Russia, there were 4.8 million SWU delivered and purchased at a cost of $417.8 million, including related shipping charges. Subject to price adjustments for U.S. inflation, USEC has committed to purchase 4.6 million SWU at a cost of $404.7 million in the six months ending December 31, 2000, and expects to purchase 5.5 million SWU at a cost of $494.1 million in calendar year 2001.

* * * * *

Inventories included in current assets represent amounts required to meet working capital needs, preproduce enriched uranium product and balance the uranium and electric power requirements of the plants.

Generally, title to uranium provided by customers for enrichment purposes does not pass to USEC. Uranium provided by customers for which title does pass to USEC is recorded on the balance sheet at estimated fair values of $101.7 million at June 30, 1999 and $40.2 million at June 30, 2000, with corresponding liabilities in the same amounts representing uranium owed to customers. In addition, USEC holds uranium for enrichment and storage purposes with estimated fair values of $829.7 million at June 30, 1999 and $682.2 million at June 30, 2000, for which title is held by customers and others.

Inventories reported as long-term assets include uranium not expected to be used or sold within one year of the balance sheet date and include the SWU and uranium components of 50 metric tons of highly enriched uranium transferred to USEC from DOE in fiscal 1998 and scheduled to be blended down to low enriched uranium over the next five years.

**4. PURCHASE OF SEPARATIVE WORK UNITS UNDER RUSSIAN CONTRACT**

In January 1994, USEC on behalf of the U.S. Government signed the 20-year Russian Contract with AO Techsnabexport ("Tenex"), the Executive Agent for the Russian Federation, under which USEC purchases SWU derived from up to 500 metric tons of highly enriched uranium recovered from dismantled Soviet nu-

clear weapons. Highly enriched uranium is blended down in Russia and delivered to USEC, F.O.B. St. Petersburg, Russia, for sale and use in commercial nuclear reactors.

Purchases of SWU derived from highly enriched uranium under the Russian Contract, including related shipping charges, in fiscal 1998, 1999 and 2000 follow (in millions):

| | SWU | Amount |
|---|---|---|
| Fiscal Years Ended June 30, | | |
| 1998 | 3.6 | $ 315.8 |
| 1999 | 3.6 | 319.6 |
| 2000 | 4.8 | 417.8 |
| | 12.0 | $1,053.2 |

Over the life of the Russian Contract, USEC expects to purchase 92 million SWU derived from 500 metric tons of highly enriched uranium, of which 15.8 million SWU had been purchased as of June 30, 2000. Subject to price adjustments for U.S. inflation, USEC has committed to purchase 4.6 million SWU at a cost of $404.7 million in the six months ending December 31, 2000, and expects to purchase 5.5 million SWU at a cost of $494.1 million in calendar year 2001.

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## 5. INCOME TAXES

The provision (benefit) for income taxes follows (in millions):

| | Fiscal Years Ended June 30, | |
|---|---|---|
| | 1999 | 200 |
| Current: | | |
| Federal | $ 5.1 | $ (2 |
| State and local | .6 | |
| | 5.7 | (1 |
| Deferred: | | |
| Federal | 40.7 | (2 |
| State and local | 5.2 | |
| | 45.9 | (2 |
| Special deferred tax benefit from transition to taxable statu | | |
| Federal | (49.8) | |
| State and local | (4.7) | - |
| | (54.5) | - |
| | $ (2.9) | $ (3 |

**USEC Prospectus**
**(July 22, 1998)**

## PROSPECTUS SUMMARY

1. The following summary is qualified in its entirety by, and should be read in conjunction with, the more detailed information and financial statements, including the notes thereto, appearing elsewhere in this Prospectus. Unless otherwise indicated or the context otherwise requires, references in this Prospectus to the "Company" and "USEC" mean, (i) at all times prior to the consummation of the Offering, United States Enrichment Corporation, the federally-chartered entity, and (ii) at all times thereafter, USEC Inc., a Delaware corporation, and its consolidated subsidiaries. References in this Prospectus to "Shares" are to the shares of common stock, par value $.10 per share (the "Common Stock"), of USEC Inc. being offered hereby. Unless the context otherwise requires, all Share data in the Prospectus assume no exercise of the U.S. Underwriters' over-allotment option. As used in this Prospectus, the terms "fiscal" or "fiscal year" refer to the Company's fiscal year which is the twelve-month period ending on June 30 of the designated year. Terms not defined in this Prospectus Summary are defined elsewhere in this Prospectus or in the Glossary.

### THE COMPANY

### OVERVIEW

USEC, a global energy company, is the world leader in the production and sale of uranium fuel enrichment services for commercial nuclear power plants. USEC cur-

rently has approximately a 75% share of the North American uranium enrichment market and a 40% share of the world market. Uranium enrichment is a critical step in transforming natural uranium into fuel for nuclear reactors to produce electricity. USEC enriches uranium utilizing the gaseous diffusion process at two plants located in Paducah, Kentucky and near Portsmouth, Ohio. USEC's fiscal 1997 revenue and pre-tax income were $1.6 billion and $250.1 million, respectively. The Company's net income on a pro forma basis (primarily to reflect a provision for federal, state and local income taxes and interest expense) for fiscal 1997 was $133.2 million.

The Company supplies enriched uranium to approximately 60 customers for use in 176 nuclear reactors located in 14 countries throughout the world. Generally, the Company's contracts with its customers are "requirements" contracts pursuant to which the customer is obligated to purchase a specified percentage of its enriched uranium requirements from the Company. Consequently, the Company's annual sales are dependent upon the customers' requirements for enrichment services, which are driven by nuclear reactor refueling schedules, reactor maintenance schedules, customers' considerations of costs, and regulatory actions. Based on customers' estimates of their requirements, as of March 31, 1998, the Company had long-term requirements contracts with utilities to provide uranium enrichment services aggregating $3.2 billion through fiscal 2000 and $7.4 billion through fiscal 2009.

The Company began operations on July 1, 1993 (the "Transition Date") when the U.S. Government's uranium enrichment activities were transferred from the

United States Department of Energy ("DOE") to the Company. Since the Transition Date, USEC has adopted a series of private-sector management practices which have enabled it to be more responsive to its customers and to market forces. Applying private sector principles has significantly improved the Company's competitive positioning by: (i) adding $4.3 billion in new contract commitments through fiscal 2009 during the period from the Transition Date through March 31, 1998 (consisting of $4.1 billion from extensions of contracts or new contracts with existing customers and $200.0 million from contracts with new customers); (ii) significantly reducing order fulfillment times; (iii) maintaining a strong safety record at the gaseous diffusion plants (the "GDPs") while increasing Company-wide focus on regulatory compliance; and (iv) obtaining certification for the GDPs from the U.S. Nuclear Regulatory Commission (the "NRC"). In addition, USEC has acquired a significant inventory of uranium from the U.S. Government.

**RISK FACTORS**

An investment in the Common Stock involves certain risks associated with the Company's business, including the following: (i) risks associated with enrichment operations; (ii) reliance on the nuclear utility industry and customer concentration; (iii) competition and the trend toward lower pricing; (iv) risks associated with the contract between USEC and Techsnabexport Co. Ltd., a Russian government entity ("Tenex"), dated January 14, 1994 (the "Russian HEU Contract"); (v) dependence on sustained supply of electricity; (vi) risks related to Atomic Vapor Laser Isotope Separation ("AVLIS"); (vii) risks associated with international trade regulations;

(viii) fluctuations in the Company's quarterly financial results due to cyclical demand; (ix) risks associated with NRC regulation; and (x) certain environmental risks.

For a fuller discussion of these and other risk factors affecting the Company and its businesses, see "Risk Factors."

**STRATEGY**

The Company's goal is to continue to be the world's leading supplier of uranium fuel enrichment services and to diversify over time into related strategic businesses that will contribute to the Company's growth and profitability. To achieve its goal, the Company intends to focus on the following:

Aggressively Pursue Sales Opportunities. The Company has implemented a strategy designed to increase sales to existing customers and to add new customers. Flexible contract terms have replaced standardized DOE contracts, and the Company has increased its attention to customer service, product quality and reliability.

Improve Operating Efficiencies. The Company plans to continue to improve operating efficiencies and productivity by implementing and monitoring a rigorous cost management program.

Commercialize AVLIS Technology. USEC plans to complete the development and commence commercialization of the next generation of uranium enrichment technology, AVLIS, which uses lasers to enrich uranium, and which should permit USEC to remain one of the lowest cost suppliers of uranium enrichment services and enhance its competitive position. Commercial deployment of AVLIS is anticipated in 2005.

Diversify Over the Longer Term. Over the longer term, the Company intends to diversify its business by pursuing selected growth opportunities that build upon the Company's core competencies, technology and customer relationships.

**COMPETITIVE ADVANTAGES**

Although the Company operates in a highly competitive environment, USEC believes that the following factors should enable it to compete effectively and continue as the world leader in the uranium enrichment market:

- Strong Financial Position. USEC's strong financial position results from a significant backlog of contracted services attributable to established customers and a pro forma balance sheet at March 31, 1998 with $550.0 million in debt (representing 32% of total capitalization, adjusted to include short-term debt). The Company has long-term requirements contracts with utilities to provide uranium enrichment services aggregating $3.2 billion through fiscal 2000 and $7.4 billion through fiscal 2009.

- Favorable Arrangements with the U.S. Government. The Company is the beneficiary of several favorable long-term arrangements with the U.S. Government, implemented in connection with USEC's Privatization. These arrangements, which will continue following the Privatization, include:

- An advantageous lease providing for nominal rent payments for its production facilities with an open term renewal option;

- Low-cost power purchase arrangements pursuant to which USEC purchases electricity (which represents up

to 59% of the Company's production costs) at an average cost of less than 2 cents/ kWh; and

- The assumption by the U.S. Government of substantially all liabilities arising from the operation of the GDPs prior to the Privatization, including substantially all environmental liabilities.

- AVLIS. USEC has the exclusive commercial rights to the AVLIS technology developed by the U.S. Government and believes that it has a considerable lead-time advantage over others attempting to develop similar laser-based uranium enrichment technology.

- Ability to Complete Sales from Natural Uranium Inventory. USEC is positioned to supplement its uranium enrichment revenues through new sales of natural uranium. USEC's existing inventory contains a substantial amount of natural uranium, which has been supplemented by the transfer of additional uranium from the U.S. Government.

- Executive Agent Under a U.S./Russia Agreement. USEC is the Executive Agent for the United States under a government-to-government agreement between the United States and the Russian Federation. In this capacity, USEC purchases from Russia the separative work unit ("SWU") component of low-enriched uranium ("LEU") derived from highly enriched uranium ("HEU") recovered from dismantled nuclear weapons of the former Soviet Union. Although acting as U.S. Executive Agent may pose certain risks, the arrangement provides an important strategic opportunity for USEC to introduce additional uranium enrichment services from Russia to the global market on an orderly basis and in a competitive manner that ensures the reliability and continuity of supply to enrichment customers.

## THE URANIUM ENRICHMENT MARKET

Demand for uranium enrichment services is a function of the number of nuclear reactors using enriched uranium fuel and their fuel requirements. Nuclear power accounts for 19% of the domestic and 17% of the worldwide production of electricity. As of March 31, 1998, there were 108 utilities operating 378 nuclear power reactors that use enriched uranium for fuel, including 105 reactors in the United States.

The world demand for enrichment services is anticipated to be relatively stable or increase slightly over the next 10 to 15 years. USEC believes that the nuclear power market in the U.S. and Western Europe may decline slightly over the next 10 to 15 years, counter-balanced by an increase in the Asian market during the same period. The Company anticipates that decreases in demand from reactors that cease operations during this period will be offset by increases in demand from new reactors expected to come on-line, as well as by increased utilization at existing reactors. Globally, uranium enrichment is provided by four major suppliers, including USEC.

## HISTORY OF USEC

USEC was established by the Energy Policy Act of 1992 (the "Energy Policy Act") as a wholly-owned government corporation to take over DOE's uranium enrichment operation. This transfer to a government-owned corporation was intended to enable USEC to operate like a private sector business in preparation for its eventual privatization.

In April 1996, the USEC Privatization Act (the "Privatization Act") was enacted, which provided the mechanics

for the Privatization, clarified the relationship between USEC and the U.S. Government following the Privatization and addressed certain other matters. By facilitating the transfer of the uranium enrichment business to the private sector, the U.S. Government sought to position the Company as a viable competitor in the global market for uranium enrichment services. On July 25, 1997, in accordance with the Energy Policy Act, President Clinton approved the implementation of the Privatization.

After the Privatization, the U.S. Government will not own any Shares of the Company, and the Company will not be an agency or instrumentality of the U.S. Government.

* * *

The Company's principal office is located at 2 Democracy Center, 6903 Rockledge Drive, Bethesda, MD 20817, and its telephone number is (301) 564-3200.

* * * * *

**AVLIS**

New Technology. There are a number of risks associated with the development and commercialization of AVLIS, a new laser-based uranium enrichment technology (see "Business—Advanced Laser-Based Technology"), and any of these could have a material adverse effect on the Company's financial or competitive position. Additional equipment demonstration and testing activities are necessary before the Company will be in a position to finalize its decision to construct a full-scale commercial facility. The Company could encounter unanticipated delays or expenditures at this stage. If the Company determines not to proceed with AVLIS de-

ployment, the Company would pursue other options for enrichment services such as GDP upgrades or exploring other new technologies, which could have a material adverse effect on the Company's financial or competitive position. In addition, the Company could incur certain additional costs in connection with terminating the AVLIS project, including payments to certain contractors. In the event the Company determines to deploy AVLIS, no assurance can be given that an AVLIS plant could be completed as scheduled or that a full-scale facility will operate at its design capacity.

Based on preliminary design drawings and assumptions regarding the suitability of available sites, AVLIS development and deployment was estimated in September 1997 to cost approximately $2.2 billion from fiscal 1998 through fiscal 2005. The Company periodically re-evaluates its AVLIS estimated costs and currently believes this estimate could vary by up to 20%. If the Company determines to deploy AVLIS, there can be no assurance that development costs or construction costs associated with AVLIS would not be higher than anticipated.

NRC Licensing of AVLIS. The NRC will have regulatory authority over the AVLIS plant and will have to issue a construction and operating license before construction can begin. The NRC will need to develop guidelines for its review of the facility. The development of the guidelines, or the nature and extent of any third-party intervention in the licensing process, could delay or otherwise affect licensing, which, in turn, could delay the commencement of construction. In addition, the NRC would likely require that the Company obtain commercial nuclear liability insurance as a condition to obtaining an NRC license since a commercial AVLIS

facility will not be indemnified under the Price-Anderson Amendments Act of 1988 (the "Price-Anderson Act"). There can be no assurance as to the availability, terms or coverage of insurance.

Financing. The Company will require significant financing to achieve commercial deployment of AVLIS. There can be no assurance that financing will be available when required, and the Company cannot predict the cost of or the terms on which such financing would be available.

Intellectual Property. The Company relies on a combination of patent laws, confidentiality procedures and contractual provisions to protect its proprietary information and intellectual property rights related to the AVLIS technology. The Company has received a letter from a third party setting forth such third party's belief that AVLIS will use certain of such third party's technology. See "Business—Advanced Laser-Based Technology—Intellectual Property." In addition, the Company is aware of patents issued to third parties which cover certain technology used in laser-based products; the Company or its licensors may be required to obtain a license to one or more of such patents. There can be no assurance that third party infringement claims will not be brought against the Company in the future, that the Company would not have to pay damages or would not be enjoined in the event any such claims were successful, or that the Company would be able to obtain necessary licenses to certain technology. In the event of such a successful claim of infringement, the Company believes that it can re-engineer the affected apparatus, system or method or obtain any necessary licenses from third parties. However, in the event the Company were

unable to successfully re-engineer or obtain from third parties any required licenses at a reasonable cost or at all, a successful claim of infringement could have a material adverse effect on the Company.

* * * * *

**NATURAL URANIUM SALES**

The Company anticipates supplementing its revenues from uranium enrichment services through sales of natural uranium in its inventory and natural uranium transferred to it by the DOE. The quantity of material that USEC will be able to sell in any given year and the revenue generated therefrom will be dependent on market conditions (including any sales by the U.S. Government out of its inventory) and prices at the time, as well as statutory and contractual restrictions on the volume of such sales. While the Company does not anticipate making significant natural uranium sales until after fiscal 2000, there can be no assurance that the Company will be able to sell such natural uranium at anticipated prices and quantities. The failure to complete sales of natural uranium as anticipated could have an adverse effect on the Company's financial condition. See "Business—Natural Uranium and HEU from DOE."

**FOREIGN OWNERSHIP RESTRICTIONS**

The Company's Certificate of Incorporation (the "Charter") sets forth certain restrictions on foreign ownership of securities of the Company, including a provision prohibiting foreign persons (as defined in the Charter) from collectively having beneficial ownership of more than 10% of such voting securities. The Charter also contains certain enforcement mechanisms with respect to the foreign ownership restrictions, including suspension of

voting rights, redemption of such Shares and/or the refusal to recognize the transfer of Shares on the record books of the Company. See "Description of Capital Stock—Foreign Ownership Restrictions."

**ANTI-TAKEOVER PROVISIONS**

Under the Privatization Act, no person may acquire, directly or indirectly, beneficial ownership of more than 10% of USEC's voting securities for a three-year period after consummation of the Privatization. The By-Laws establish certain advance notice requirements for the nomination of directors as well as for other stockholder proposals. The Company is also subject to Section 203 of the Delaware General Corporation Law ("DGCL"), which could have the effect of delaying or preventing a change in control of the Company. To the extent that these provisions discourage takeover attempts, they could deprive stockholders of opportunities to realize takeover premiums for their Shares or could depress the market price of the Shares. See "Description of Capital Stock."

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**MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS**

The following discussion should be read in conjunction with, and is qualified in its entirety by reference to, the financial statements and notes thereto appearing elsewhere in this Prospectus.

**OVERVIEW**

USEC, a global energy company, is the world leader in the production and sale of uranium fuel enrichment ser-

vices for commercial nuclear power plants, with approximately 75% of the North America market and 40% of the world market. Uranium enrichment is a critical step in transforming natural uranium into fuel for nuclear reactors to produce electricity. Based on customers' estimates of their requirements, at March 31, 1998, the Company had long-term requirements contracts with utilities to provide uranium enrichment services aggregating $3.2 billion through fiscal 2000 and $7.4 billion through fiscal 2009.

The Company is the Executive Agent of the U.S. Government under a government-to-government agreement to purchase SWU recovered from dismantled nuclear weapons from the former Soviet Union for use in commercial electricity production. As the leading U.S. provider of enrichment services, the Company believes that it is best positioned to act as U.S. Executive Agent under the Russian HEU Contract because it can introduce SWU from Russian HEU in a manner that is not disruptive to an orderly market and ensures the reliability and continuity of supply to enrichment customers. The Company's cost of sales has been, and will continue to be, adversely affected by amounts paid to purchase SWU under the Russian HEU Contract at prices which are substantially higher than its marginal production cost at the GDPs. In addition, as the volume of Russian SWU purchases has increased, the Company has operated the GDPs at lower production levels resulting in higher unit production costs. Pursuant to the Russian HEU Contract, Russian SWU purchases will peak in calendar year 1999 at 5.5 million SWU per year and are expected to remain at that level thereafter.

The Company's agreements with electric utilities are generally long-term requirements contracts under which customers are obligated to purchase a specified percentage of their requirements for uranium enrichment services. Customers, however, are not obligated to make purchases or payments if they do not have any requirements. The stated term of contracts transferred by DOE to the Company on the Transition Date is 30 years, although future purchase obligations thereunder may be terminated by, among other things, giving 10 years' notice, although the Company has allowed shorter notice periods. The terms of newer contracts entered into by the Company since the Transition Date range from 3 to 11 years and do not typically provide for advance termination rights. The Company believes that the trend for contracts with shorter terms will continue, with the newer contracts generally containing terms in the range of 3 to 7 years.

The Company's revenue and operating results can fluctuate significantly from quarter-to-quarter, and in some cases, year-to-year. Customer requirements are determined by refueling schedules for nuclear reactors, which generally range from 12 to 18 months (or in some cases up to 24 months), and are in turn affected by, among other things, the seasonal nature of electricity demand, reactor maintenance, and reactors beginning or terminating operations. Utilities typically schedule the shutdown of their reactors for refueling to coincide with the low electricity demand periods of spring and fall. Thus, some reactors are scheduled for fall refueling, spring refueling or for 18-month cycles alternating between both seasons. In addition, USEC provides customers a window ranging from 10 to 30 days to take de-

livery of ordered product. The timing of larger orders for initial core requirements for new nuclear reactors also can affect operating results. Refueling orders are large, typically averaging $14.0 million per customer order for the Company's uranium enrichment services. The Company plans its cash outlays for power and other production costs, a significant portion of which is fixed in the short term, on the basis of meeting customer orders and achieving revenue targets for the year. As a result, a relatively small change in the timing of customer orders may cause earnings and cash flow results to be substantially above or below expectations. Notwithstanding this variability, the Company has significant backlog based on customers' estimates of their requirements for uranium enrichment services.

* * * * *

The Company utilizes approximately 4,300 workers at the GDPs who are employed by Lockheed Martin Utility Services, Inc. ("LMUS"), a subsidiary of Lockheed Martin Corporation ("Lockheed Martin"). Under an operations and maintenance contract with the Company (the "LMUS Contract"), LMUS provides labor, services, and materials and supplies to operate and maintain the GDPs, for which the Company funds LMUS for its actual costs and pays contracted fees. The LMUS Contract expires on October 1, 2000. If LMUS meets certain specified operating and safety criteria and demonstrates cost savings that exceed certain targets, LMUS can earn an annual incentive fee. On average, LMUS has earned 25% to 50% of the total potential incentive fees available under the contract, reflecting positive achievements in safety and customer deliveries offset by less-than-targeted achievement in production capability.

The Company accrues estimated costs for the future disposition of depleted UF(6) generated as a result of its operations. Costs are dependent upon the volume of depleted UF(6) generated and estimated conversion and disposal costs. The Company stores depleted UF(6) at the GDPs and continues to evaluate various proposals for its disposition. Pursuant to the Privatization Act and the Depleted UF(6) MOA, all liabilities arising out of the disposal of depleted UF(6) generated by USEC through the Privatization Date are the responsibility of DOE.

The Company leases the GDPs and process-related machinery and equipment at attractive, below-market terms from DOE. Upon termination of the Lease Agreement, USEC is responsible for certain lease turnover activities at the GDPs. Lease turnover costs are accrued over the estimated term of the Lease Agreement which is estimated to extend until 2005. Pursuant to the Energy Policy Act and the Privatization Act, with certain exceptions the U.S. Government is responsible for all environmental liabilities, including the decontamination and decommissioning of the GDPs at the end of their operating lives, associated with the operation of the GDPs prior to the Privatization Date.

The Company expects to incur additional production costs of $14.8 million per year subsequent to the Privatization for taxes other than income taxes and commercial property insurance premiums.

As Executive Agent under the Russian HEU Contract, the Company has committed to purchase SWU in the amount of $376.2 million in calendar 1998. In each of calendar years 1999 to 2001, the Company has committed to purchase SWU in the amount of $475.8 million,

subject to certain purchase price adjustments for U.S. inflation. Under an amendment to the Russian HEU Contract in November 1996, SWU quantities and a mechanism for establishing prices for SWU purchases under the Russian HEU Contract through 2001 have been set. As of March 31, 1998, the Company has committed to purchase SWU derived from HEU through 2001 as follows:

| CALENDAR YEAR AMOUNT | SWU | DERIVED FROM METRIC TONS OF HEU |
|---|---|---|
| (MILLIONS) | (MILLIONS) | |
| Nine Months Ended December 31, 1998 | 4.4 | 24 |
| $376.2 | | |
| 1999 | 5.5 | 30 |
| 475.8 | | |
| 2000 | 5.5 | 30 |
| 475.8 | | |
| 2001 | 5.5 | 30 |
| 475.8 | | |

The Russian HEU Contract has a 20-year term; the Company expects its purchases after 2001 to remain at the 5.5 million SWU per year level.

The Company pays for the SWU delivered under the Russian HEU Contract within 60 days after delivery. In order to facilitate and support the Russian Federation's implementation of the contract, however, the Company

made advance payments to Tenex of $60 million in calendar 1994 and $100 million in each of calendar years 1995 and 1996. The Company credits advance payments, up to $50 million per year, against half of the SWU value in each delivery and makes cash payments for the remaining portion. As of March 31, 1998, $162.0 million of the $260.0 million in advance payments had been credited against SWU purchased. From inception of the Russian HEU Contract to March 31, 1998, the Company purchased 6.5 million SWU derived from 35 metric tons of HEU at an aggregate cost of $556.5 million, including related shipping charges. At March 31, 1998, the Company had $98.0 million in credits remaining to be applied against future purchases of SWU as follows: $48.0 million to be applied in calendar 1998, and $50.0 million in calendar 1999.

* * * * *

## INDUSTRY OVERVIEW

### THE ENRICHMENT PROCESS

Overview. As found in nature, uranium consists of three isotopes, the two principal ones being uranium-235 (U(235)) and uranium-238 (U(238)). U(238) is the more abundant but is not fissionable. U(235) is the fissionable isotope, but its concentration in natural uranium is only about .711% by weight. Light water nuclear reactors, which are operated by most nuclear utilities in the world today, require low enriched uranium fuel, or LEU, with a U(235) concentration in the range of 3% to 5% by weight. Uranium enrichment is the process by which the concentration of U(235) is increased to that level.

Two existing commercial technologies are currently used to enrich uranium for nuclear power plants—the gaseous

diffusion process and the gas centrifuge process. The gaseous diffusion process involves the passage of UF(6) in a gaseous form through a series of filters (or porous barrier) such that the UF(6) is continuously enriched in U(235) as it moves through the process. Because U(235) is lighter, it passes through the barrier more readily than does U(238), resulting in a gaseous uranium that is enriched in U(235), the fissionable isotope. The gaseous diffusion process is power-intensive, requiring significant amounts of electricity to push the UF(6) through the filters. See "Business—Power." The other enrichment process, gas centrifuge, is significantly less power intensive than the gaseous diffusion process and employs rapidly spinning cylinders containing UF(6) to separate the fissionable U(235) isotope from the non-fissionable U(238).

The fundamental building block of the gaseous diffusion process is known as a stage, consisting of a compressor, a converter, a control valve and associated piping. The compressors, which are driven by large electric motors, are used to circulate the process gas and maintain flow. The converters contain porous tubes known as barrier through which the process gas is diffused. Stages are grouped together in series to form an operating unit called a cell. A cell is the smallest group of stages that can be removed from service for maintenance. Gaseous diffusion plants are designed so that cells can be taken off line with little or no interruption in the process. In each converter, the portion of the process gas that passes through the barrier is slightly enriched in U(235) and is fed to the next higher stage. The gas, which has not passed through the barrier, is depleted in U(235) to the same degree. It is recycled back to the next lower stage. Because the velocity difference between the two

isotopes of uranium is very small, hundreds of successive stages are required for enrichment. A gaseous diffusion plant configured to produce material with a U(235) concentration of 4% from material at .711% by weight U(235) would contain at least 1,200 stages in series. See "Business—GDPs/Operations."

SWU. The standard of measure of effort or service in the uranium enrichment industry is separative work units or SWU. A SWU is the amount of work or effort that is required to transform a given amount of natural uranium feed stock (UF(6)) into two streams of uranium, one enriched in the U(235) isotope and the other depleted in the U(235) isotope. Prices for enrichment services are based upon SWU, and the enrichment capacity of suppliers and the enrichment requirements of nuclear utilities are also denominated in SWU.

Overfeeding/Underfeeding. SWU (and the related electricity required for enrichment) and natural uranium are, to a certain extent, interchangeable in the process to create enriched uranium. The Company can feed (i) more natural uranium into the enrichment process, a mode of operation called "overfeeding," or (ii) less uranium into the enrichment process, a mode of operation called "underfeeding." Overfeeding is economical if the sum of the value of the additional natural uranium and the cost of disposing of the additional depleted UF(6) generated is lower than the cost of the electricity used to produce the additional enriched uranium. Underfeeding is economical if the cost of the additional electricity required is lower than the savings from the use of less natural uranium and its related disposal costs. Underfeeding serves to stockpile the inventory of natu-

ral uranium which, if not needed for production, can be sold.

## THE NUCLEAR FUEL CYCLE

Electric utilities with light water nuclear reactors require fissionable uranium because it is the act of fission which releases the necessary heat required to produce steam for the turbines which generate electricity. The provision of uranium enrichment services (i.e., the process by which the concentration of the fissionable isotope U(235) in natural uranium is increased to levels suitable for commercial use) is one vital step in the nuclear fuel cycle as depicted in the diagram below. Utilities typically obtain natural uranium as uranium ore concentrate from a mining and milling company or other natural uranium supplier. Utilities arrange to have the uranium ore concentrate converted to uranium hexafluoride (UF(6)) at one of several converters located around the world. The UF(6) is delivered to an enrichment services provider, such as the Company, for enrichment in U(235). The enriched uranium is transported to a nuclear fuel fabricator to have the enriched UF(6) converted into uranium dioxide pellets for fabrication into fuel elements suitable for use in nuclear reactors.

**Commercial Nuclear Fuel Cycle.**

Enrichment is one of a series of steps required to prepare naturally occurring uranium for use as nuclear fuel.

[Graphic Omitted]

## MARKET FOR ENRICHMENT SERVICES

Supply Overview. There are currently four major uranium enrichment suppliers worldwide: USEC, Tenex, Eurodif and Urenco. Tenex is an entity of the Russian

government. Eurodif is a multinational consortium controlled by the French government. Other participants in the consortium include the Spanish, Belgian, Italian and Iranian governments. Urenco is a consortium owned one-third by the British government, one-third by the Dutch government and one-third by two German utilities. Japan Nuclear Fuels Limited ("JNFL") and a Chinese state-owned enrichment supplier are smaller providers that primarily serve their respective domestic markets. See "Risk Factors—Competition; Currency Exchange Rates; Trend Toward Lower Pricing."

In addition, a relatively small spot market exists for uranium enrichment services. The spot market developed in the mid-1980s as a result of utilities reselling enrichment services that they were required to purchase under take-or-pay contracts for reactors that were subsequently canceled or delayed and by SWU sales from the former Soviet Union. By the early 1990s, however, the spot market had declined in importance due to the elimination of utilities' excess inventories and the impact of trade restrictions and market practices in certain countries which have restricted sales from states of the former Soviet Union into these markets. In 1997, the spot market supplied less than 2% of the total world market for enrichment services.

Suppliers and Market Share. The following table sets forth certain information about the major SWU suppliers, including the Company's estimate of the SWU production capacity for each supplier. "Nameplate Capacity" refers to the designed capacity of the facilities operated by the suppliers. Supply for Tenex also reflects trade restrictions and market practices limiting its ability to sell in the U.S., Western Europe and certain Asian countries.

**FISCAL YEAR 1997 ESTIMATED ENRICHMENT CAPABILITIES (IN MILLIONS)**

| SUPPLIER TECHNOLOGY | NAMEPLATE CAPACITY (1) (SWU) | SUPPLY (SWU) | |
|---|---|---|---|
| USEC | | | |
| Produced | 18.7 | 10.3 | Gaseous Diffusion |
| Purchased | -- | 3.1 | Purchased |
| USEC Total | 18.7 | 13.4 | |
| Eurodif | 11.0 | 7.5(2) | Gaseous Diffusion |
| Tenex | 20.0 | 7.5 | Gas Centrifuge |
| Urenco | 3.8 | 3.8 | Gas Centrifuge |
| Other (3) | 1.5 | 1.5 | Various |
| Total | 55.0 | 33.7 | |

Source: Company estimates derived from industry, trade and consulting publications

(1) Nameplate capacity refers to the designed capacity of the facilities operated by the respective supplier.

(2) Eurodif's production reflects its current economics: the relative SWU price versus the prevailing cost of power.

(3) This includes the spot market, JNFL and a Chinese state-owned facility.

The Company's estimate of the fiscal 1997 market share of the four major suppliers and the spot market in the five geographical market sectors is set forth in the following table.

FISCAL YEAR 1997 ESTIMATED WORLDWIDE MARKET SHARE

| | FY 97 WORLD MARKET SHARE | NORTH AMERICA (1) | ASIA | W. EUROPE | OTHER (2) |
|---|---|---|---|---|---|
| USEC | 40% (3) | 75% (3) | 68% | 10% | 0% |
| Eurodif | 22(4) | 12 | 14 | 49 | 28 |
| Tenex | 11 | 5(4) | 5 | 16 | 0 |
| Urenco | 4 | 7 | 6 | 24 | 45 |
| Spot/Other(5) | 100% | 2 | 8 | 2 | 100% |
| Total (6) | | 100% | 100% | 100% | |

Source: Company estimates derived from industry, trade and consulting publications

(1) Includes: U.S. and Mexico.
(2) Includes: Argentina, Brazil, China, India, Iran, Pakistan, South Africa, North Korea and Turkey.
(3) Includes approximately 4.5% North American and 1.5% world market share for Russian matched sales. See "Business—Foreign Trade Matters."

(4) Excludes Russian matched sales in the U.S. See "Business—Foreign Trade Matters."
(5) Includes the spot market, JNFL and a Chinese state-owned facility.
(6) Percentages may not sum to 100% due to rounding.

Eurodif operates a single gaseous diffusion plant and is part of a closely interlocked French nuclear infrastructure; it purchases nearly all of its power from Electricite de France ("EdF") and sells about 60% of its annual SWU output to EdF.

The Tenex facilities consist of a number of early-generation gas centrifuge plants. Although Tenex's centrifuge plants are older and therefore less efficient than those of Urenco, USEC believes that Tenex has the lowest overall production costs of the major suppliers. Tenex benefits from (i) low power requirements (a characteristic of centrifuge technology), (ii) moderate manpower costs (a result of its low wage rate, notwithstanding its high labor and overhead levels) and (iii) minimal capital charges. Despite Tenex's favorable cost structure, it operates at less than maximum capacity because trade and political restrictions limit its ability to access the United States, Western European and certain Asian markets. In addition, the Company believes that Tenex's production capacity is further constrained by its current equipment conditions.

Urenco has a favorable competitive cost position, influenced significantly by its use of the gas centrifuge. Although Urenco's production capacity is currently 3.8 million SWU, it continues to add capacity and make systematic improvements to its centrifuge designs, thereby increasing efficiency and output. These changes serve to incrementally improve Urenco's cost position and increase capacity, which is expected to increase to approximately 5 million SWU by

2000. Urenco is also currently in the testing phase of its latest centrifuge technology, which could be deployed in the 2000 to 2001 time frame.

Additional Supply Sources. In addition to the primary uranium enrichment suppliers, other sources of enriched uranium exist. The principal source is LEU derived from HEU obtained from dismantled United States and Russian nuclear weapons and military stockpiles. As the Executive Agent to the U.S. Government under the government-to-government agreement between the United States and the Russian Federation, USEC purchases the uranium enrichment component of HEU recovered from dismantled Russian nuclear weapons. USEC has also received transfers of HEU from the U.S. Government. Russia has significant supplies of HEU from dismantled weapons and military stockpiles, and its future disposition plans are unknown. According to an HEU disposition plan issued by the DOE in 1996, the U.S. Government has approximately 35 to 40 metric tons of excess HEU which the U.S. Government could blend down into LEU and introduce into the market in the 2001 to 2011 time frame. With respect to any U.S. Government sales of this material, such future sales would be subject to the provisions of the Privatization Act applicable to such sales.

Enrichment capacity can also be added through increases in existing capacities of suppliers or by the construction of new facilities or development of new processes. As discussed above, Urenco has plans to expand its output and is also currently testing a more advanced centrifuge. Both JNFL and the Chinese Government have been pursuing capacity expansion programs through incremental construction and the acquisition of centrifuge technology which in total is not expected to exceed a capacity of 2.1 million SWU per year.

Demand Overview. According to the Nuclear Energy Institute, an industry organization, nuclear power represents approximately 19% of the domestic and 17% of the worldwide utility electricity production. The demand for uranium enrichment services is a function of the total number of light water nuclear reactors using enriched uranium fuel and their total fuel requirements. As of March 31, 1998, there were 108 utilities operating 378 nuclear reactors that use enriched uranium for fuel in 28 countries. This includes 44 utilities operating 105 nuclear reactors in the United States.

Substantial increases or decreases in total SWU demand occur only as new reactors are brought on line or when others cease operations. Based on the relatively low operating costs of nuclear reactors, most utilities run their nuclear reactors at maximum output to meet their base-load requirements. Because of this base-load nature of nuclear operations, declines in electricity consumption have a relatively modest impact on the fuel needs of operating reactors. As a result, over the long term, utility demand for SWU is generally stable.

Deliveries of enriched uranium to customers are determined by reactor refueling schedules which are affected by, among other things, the seasonal nature of electricity demand and the operating availability of the reactor. Utilities try to schedule the shutdown of their reactors for refueling to coincide with periods of low demand, typically spring and fall. For efficiency reasons, utilities also attempt to run their reactors for periods of 12 months, 18 months, or in some cases, up to 24 months between refuelings. Thus some reactors are scheduled for fall refuelings, some for spring refuelings, and some are scheduled for 18-month cycles which alternate between the two seasons.

LEU may only be exported to utilities in those countries that have a nuclear agreement for cooperation in effect with the United States. Since not all countries are parties to such agreements with the United States, certain markets are not currently available to the Company. See "Business—Foreign Trade Matters."

* * * * *

**BUSINESS**

**1. OVERVIEW**

USEC, a global energy company, is the world leader in the production and sale of uranium fuel enrichment services for commercial nuclear power plants. USEC currently has approximately a 75% share of the North American uranium enrichment market and a 40% share of the world market. Uranium enrichment is a critical step in transforming natural uranium into fuel for nuclear reactors to produce electricity. USEC enriches uranium utilizing the gaseous diffusion process at two plants located in Paducah, Kentucky and near Portsmouth, Ohio. USEC's fiscal 1997 revenue and pre-tax income were $1.6 billion and $250.1 million, respectively. The Company's net income on a pro forma basis (primarily to reflect provision for federal, state and local income taxes and interest expense) for fiscal 1997 was $133.2 million.

The Company supplies enriched uranium to approximately 60 customers for use in 176 nuclear reactors located in 14 countries throughout the world. Generally, the Company's contracts with its customers are "requirements" contracts pursuant to which the customer is obligated to purchase a specified percentage of its enriched uranium requirements from the Company. Consequently, the Company's annual sales are dependent upon the customers' requirements for

the Company's services, which are driven by nuclear reactor refueling schedules, reactor maintenance schedules, customers' considerations of costs, and regulatory actions. Based on customers' estimates of their requirements, as of March 31, 1998, the Company had long-term requirements contracts with utilities to provide uranium enrichment services aggregating approximately $3.2 billion through fiscal year 2000 and $7.4 billion through fiscal year 2009. As of March 31, 1997, the Company had long-term requirements contracts to provide uranium enrichment services aggregating approximately $3.6 billion through fiscal year 1999 and $8.6 billion through fiscal year 2008.

The Company began operations on the Transition Date when the U.S. Government's uranium enrichment activities were transferred from DOE to the Company. Since the Transition Date, USEC has adopted a series of private-sector management practices which have enabled it to be more responsive to its customers and to market forces. Applying private sector principles has significantly improved the Company's competitive positioning by: (i) adding $4.3 billion in new contract commitments through fiscal 2009 during the period from the Transition Date through March 31, 1998 (consisting of $4.1 billion from extensions of contracts or new contracts with existing customers and $200.0 million from contracts with new customers); (ii) significantly reducing order fulfillment times; (iii) maintaining a strong safety record at the GDPs while increasing Company-wide focus on regulatory compliance; and (iv) obtaining certification for the GDPs from the NRC. In addition, USEC has acquired a significant inventory of uranium from the U.S. Government.

**STRATEGY**

The Company's goal is to continue to be the world's leading supplier of uranium fuel enrichment services and to diver-

sify over time into related strategic businesses that will contribute to the Company's growth and profitability. To achieve its goal, the Company intends to focus on the following:

Aggressively Pursue Sales Opportunities. The Company has implemented a strategy designed to increase sales to existing customers, many of whom currently buy less than 100% of their requirements from the Company (typically 70%) and to add new customers. Flexible contract terms have replaced standardized DOE contracts, and the Company has increased its attention to customer service, product quality and reliability. Management has implemented a variety of private-sector marketing principles which emphasize responsiveness to the needs of individual customers. In addition, USEC is committed to capitalizing on its reputation as a reliable and timely supplier and to delivering superior customer service. The Company has actively worked to reduce delivery times and has implemented an electronic order service system to facilitate management of customer orders and tracking of inventory.

Improve Operating Efficiencies. The Company plans to continue to improve operating efficiencies by implementing a rigorous cost management program. A cornerstone of this program is USEC's commitment to continually investigate opportunities to purchase low-cost power and to seek the most efficient use of non-firm power to minimize the cost of power per SWU produced. The Company has also adopted cost containment goals intended to be achieved through improved power utilization, increased SWU production per labor hour, and other material and service cost reductions. USEC is committed to containing operating costs while ensuring continued compliance with health, safety and environmental standards.

Commercialize AVLIS Technology. USEC plans to complete the development and commence commercialization of the next generation of uranium enrichment technology, AVLIS, which uses lasers to enrich uranium, and which should permit USEC to remain one of the lowest cost suppliers of uranium enrichment services and enhance its competitive position. The Company believes that it will be able to deploy a full-scale AVLIS facility in 2005. In addition, it is possible that the AVLIS technology may have applications in the medical, precision tool and semiconductor industries which the Company may elect to explore either on its own or through licensing arrangements. As AVLIS is being brought on line for production, the GDP facilities and AVLIS are expected to operate simultaneously. By 2006, AVLIS is expected to be able to displace some or all of the production of the GDPs; however, the Company will evaluate issues such as market demand and other supply sources at that time prior to making any decisions with respect to the GDPs.

Diversify Over the Longer Term. The Company intends to diversify its business over time into related strategic businesses that will contribute to the Company's growth and profitability. This strategy could, among other things, result in the Company becoming involved in other phases of the nuclear fuel cycle that draw on its knowledge of the nuclear industry thereby allowing the Company to become a leader in the global nuclear energy market. Although the Company as a government corporation has not identified any acquisitions or strategic alliances, it intends to pursue appropriate opportunities which, among other criteria, are expected to: (i) offer a favorable balance with respect to market potential and manageable market entry risk; (ii) broaden USEC's operating base beyond its core busi-

ness in ways that allow for the leveraging of its core competencies; (iii) diversify risk by being counter-cyclical to existing business; (iv) earn returns in excess of certain financial benchmarks including USEC's cost of capital; and (v) be accretive to earnings within a reasonable period of time.

**COMPETITIVE ADVANTAGES**

Although the Company operates in a highly competitive environment, USEC believes that the following factors should enable it to compete effectively and continue as the world leader in the uranium enrichment market:

- Strong Financial Position. USEC's strong financial position results from a significant backlog of contracted services attributable to established customers and a pro forma balance sheet at March 31, 1998 with $550.0 million in debt (representing 32% of total capitalization, adjusted to include short-term debt). The Company has long-term requirements contracts with utilities to provide uranium enrichment services aggregating approximately $3.2 billion through fiscal 2000 and $7.4 billion through fiscal 2009.

- Favorable Arrangements with the U.S. Government. The Company is the beneficiary of several favorable long-term arrangements with the U.S. Government, implemented in connection with the Privatization. These arrangements, which will continue following the Privatization, include:

  - An advantageous lease providing for nominal rent payments for its production facilities with an open term renewal option;

  - Low-cost power purchase arrangements pursuant to which USEC purchases electricity (which represents up to 59% of the Company's production costs) at an average cost of less than 2 cents/kWh; and

- The assumption by the U.S. Government of substantially all liabilities arising from the operation of the GDPs prior to the Privatization, including substantially all environmental liabilities.

- AVLIS. USEC has the exclusive commercial rights to the AVLIS technology developed by the U.S. Government and believes that it has a considerable lead-time advantage over others attempting to develop similar laser-based uranium enrichment technology. The Company believes this new technology has the potential to offer significant cost advantages over both gaseous diffusion and centrifuge technology. The Company estimates that AVLIS will use only 5% to 10% of the power currently required of gaseous diffusion, will require significantly less capital investment than new centrifuge plants of similar capacity and will operate at levels requiring about 20% to 30% less natural uranium to produce comparable amounts of enriched uranium.

- Ability to Complete Sales from Natural Uranium Inventory. USEC is positioned to supplement its uranium enrichment revenues through new sales of natural uranium. USEC's existing inventory contains a substantial amount of natural uranium, which has been supplemented by the transfer of additional uranium from the U.S. Government. See "Business—Natural Uranium and HEU from DOE."

- Executive Agent Under an U.S./Russia Agreement. USEC is the Executive Agent for the United States under a government-to-government agreement between the United States and the Russian Federation. In this capacity, USEC purchases from Russia the SWU component of LEU derived from HEU recovered from dismantled nuclear weapons of the former Soviet Union. Although acting as U.S. Executive Agent may pose certain risks, the arrangement provides an important strategic opportunity for USEC to introduce ad-

ditional uranium enrichment services from Russia to the global market on an orderly basis and in a competitive manner that ensures the reliability and continuity of supply to enrichment customers. See "Business—Russian HEU Contract."

**SALES AND MARKETING**

One of the Company's top priorities has been to obtain additional commitments from existing customers and to add new customers. In pursuing this priority, the Company has initiated a flexible approach to both pricing and service, including shortening customer order lead times and introducing systems to manage natural uranium provided by customers, while implementing a variety of initiatives designed to improve customer service.

The Company has contracts with 64 nuclear utility customers operating 273 nuclear reactors located in 14 countries. USEC provides enrichment services to 176 of these reactors. Domestic customer purchases accounted for 60% of the Company's fiscal 1997 revenue and foreign customers represented 40%. The proportion of annual revenue generated from domestic and foreign customers is expected to remain relatively constant through the end of the decade.

Following the Transition Date, the Company established a Sales and Marketing unit as a part of its strategy to grow its core business. This unit now includes 18 professionals working in three groups. The first group includes persons responsible for direct sales and is organized into two teams covering the North American and international markets, respectively. The sales executives negotiate contracts and work to establish ongoing positive relationships with their assigned customers. The second group focuses on customer service and revenue accounting. The third group develops and sustains USEC's competitive differentiation in the mar-

ketplace with the goal of ensuring that the Company maintains its market position in pricing, customer value-added service and market share.

As a part of its marketing strategy, the Company endeavors to differentiate its services from those of its competitors. In this regard, the Company believes that in making their purchasing decisions, utilities consider the price of enrichment services to be the most significant factor; however, issues of reliability, product quality and customer service are also important. The Company believes that it offers competitive prices and that it delivers superior customer service. In addition, the Company has a strong reputation as a reliable long-term supplier of enrichment services. See "Business —Competition." Consequently, the Company's marketing strategy includes efforts to educate utilities to associate the combination of these positive features—competitive pricing, customer service, reliability—with the "USEC" name. USEC believes that this name "branding" strategy will help differentiate its services from those of its competitors and enhance its position as the industry leader.

No one customer accounted for more than 10% of fiscal 1997 revenue. The Company's 10 largest customers collectively accounted for 50% of its fiscal 1997 revenue and included Arizona Public Service Company, Carolina Power and Light Company, Commonwealth Edison Company, Empresa Nacional Del Uranio, S.A. (Spain), Houston Lighting & Power Company, The Kansai Electric Power Company, Incorporated (Japan), Korea Electric Power Corporation, PECO Energy Company, Tennessee Valley Authority and Tokyo Electric Power Company, Inc.

**CUSTOMER CONTRACTS AND PRICING**

Overview. In excess of 95% of enrichment services are provided by primary suppliers selling directly to utilities under

multi-year contracts. While some of these contracts are for fixed quantities, the vast majority are "requirements" contracts. Under a requirements contract, enrichment services are provided as and when needed. The amount of enrichment services actually purchased, therefore, depends on a number of factors including the capacity and performance of the reactor. Under this type of contract, the supplier receives the benefit of increases and assumes the risk of reductions in demand. Transactions are small in number but large in size, with a typical contract exceeding $50 million in value. Purchasing strategies tend to differ by utility size, region of the world and the relative value placed upon reliability, price and flexibility. There is an emerging trend among utilities to divide their purchases among several shorter-term contracts and stagger their renegotiations, thereby giving themselves maximum flexibility to respond to the market.

The Company currently provides enrichment services to customers under two types of requirements contracts: (i) the "Utility Services Contracts," which are the uniform contracts that were transferred to the Company by DOE on the Transition Date, and (ii) New Contracts, which are (A) contracts negotiated or renegotiated by the Company with existing and new customers since the Transition Date which have been tailored to meet the particular needs of individual customers and (B) certain Utility Services Contracts which have been substantially amended since the Transition Date. A majority of USEC's customers have transitioned from their older Utility Service Contract or equivalent contract to New Contracts.

## CUSTOMERS AND REVENUE BY CONTRACT TYPE

| NEW CONTRACTS | UTILITY SERVICES CONTRACTS | |
|---|---|---|
| Number of utility customers | 50 | 10 |
| FY 1995 Revenue | 80% | 20% |
| Number of utility customers | 39 | 25 |
| FY 1996 Revenue | 58% | 42% |
| Number of utility customers | 34 | 30 |
| FY 1997 Revenue | 46% | |
| Number of utility customers | 29 | 35 |
| Nine months ended March 31, 1998 Revenue | 47% | 53% |

Utility Services Contracts. As originally executed by DOE and the customers in 1984, the Utility Services Contracts have a term of 30 years. Pursuant to the terms of these contracts, a customer may terminate its future purchase obligation without penalty if it provides 10 years' prior notice of such termination and may terminate on shorter notice by incurring a substantial termination fee.

Twenty-one customers with Utility Services Contracts are not obligated to purchase from USEC in at least one of the fiscal years 1999 through 2002 pursuant to their exercise of termination rights prior to the Transition Date.

To avoid anticipated terminations and facilitate new contract discussions, the Company has waived the 10-year notice provision for each year from fiscal 2003 through 2008, inclusive. Accordingly, the Utility Service Contract customers who have not already exercised the termination right or who have not already made firm commitments for these years can now terminate commitments to the Company in any of fiscal 2003 through 2008 by giving notice no later than October 1, 1998.

* * * * *

**LEASE AGREEMENT**

1. The Lease Agreement, which commenced on July 1, 1993, had an initial term of 6 years. The Company has the right to extend the Lease Agreement indefinitely, with respect to either or both GDPs, for successive renewal periods. In June 1997, the Company renewed the Lease Agreement for both GDPs for an additional five year term expiring on June 30, 2004. The Company may terminate the Lease Agreement, with respect to one or both GDPs, by providing two years' prior notice to DOE. The Company leases most, but not all, of the buildings and facilities at the GDP sites. The Company may increase or decrease the property under the

Lease Agreement to meet its changing requirements. Within the contiguous tracts, certain buildings, facilities and areas related to environmental restoration and waste management have been retained by DOE and are not leased to the Company.

Lease Agreement payments include a base rent representing DOE's costs in administering the Lease Agreement, including costs relating to the electric power contracts, and costs relating to DOE's regulatory oversight of the GDPs. The Company expects that the cost of the Lease Agreement will be $3.2 million in fiscal 1998.

The Lease Agreement permits DOE to store personal property, including certain hazardous materials, at the GDPs. The Lease Agreement also permits DOE to bring additional hazardous materials to the GDPs with the Company's express and specific written consent and as long as it does not significantly interfere with Company operations, and makes DOE solely responsible for the care and maintenance of DOE's personal property, any costs of its removal or disposal and for the decontamination and decommissioning of such personal property except to the extent such liability arises out of the Company's negligence or willful misconduct.

At termination of the Lease Agreement, the Company may leave the property in "as is" condition, but must remove all waste generated by the Company which is subject to offsite removal and must place the GDPs in a safe shutdown condition. Upon termination of the Lease Agreement, DOE is responsible for the costs of all decontamination and decommissioning of the GDPs. If removal of any USEC capital improvements increases DOE's decontamination and decommissioning costs, the Company is required to pay such increases. Title to capital improvements not removed by the

Company will automatically be transferred to DOE at the end of the Lease Agreement term. The Company anticipates accruing $5.6 million per year for lease turnover costs in each of fiscal 1998 and 1999.

DOE is required under the Lease Agreement to indemnify the Company for certain costs and expenses, including: (i) certain environmental liabilities attributable to operations prior to the Transition Date; (ii) certain employee pension, welfare and other benefits or liabilities incurred or accrued prior to the Transition Date; and (iii) costs or expenses relating to actions taken or not taken prior to the Transition Date pursuant to contracts transferred to the Company on the Transition Date. In addition, under the Lease Agreement DOE is required to indemnify the Company for costs and expenses related to claims asserted against or incurred by the Company arising out of DOE's operation, occupation or use of the GDPs after the Transition Date. DOE activities at the GDPs since the Transition Date have been focused primarily on environmental restoration and waste management and management of depleted UF(6). DOE is required to indemnify the Company against claims for public liability (i) arising out of or in connection with activities under the Lease Agreement, including transportation and (ii) arising out of or resulting from a nuclear incident or precautionary evacuation. DOE's obligations are capped at the $8.96 billion statutory limit set forth in the Price-Anderson Act for each nuclear incident or precautionary evacuation occurring inside the United States.

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**[FOR PUBLIC FILE]**

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**PUBLIC DOCUMENT**
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December 19, 2000

**VIA HAND DELIVERY**

The Honorable Norman Y. Mineta
Secretary of Commerce
Attn: Import Administration
U.S. Department of Commerce, Room 1870
14th Street & Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Petition for the Imposition of Antidumping And Countervailing Duties On Low Enriched Uranium From France, Germany, The Netherlands and the United Kingdom

Dear Secretary Mineta:

This letter is filed on behalf of the Ad Hoc Utilities Group (the "Utilities Group") and its individual members, and serves as our entry of appearance. The members of the

Utilities Group are Arizona Public Service Co.; Carolina Power & Light Co.; Commonwealth Edison Co.; Consumers Energy; Dominion Generation; Duke Energy Corp.; DTE Energy; Entergy Services, Inc.; First Energy Nuclear Operating Co.; Nuclear Management Co.; PSEG Nuclear LLC; Southern Nuclear Operating Co.; Union Electric Company (d/b/a AmerenUE); and Wolf Creek Nuclear Operating Corp.

* * * * *

> The Department will not consider the subcontractor to be the manufacturer or producer, regardless of the proportion of production attributable to the subcontracted operation or the location of the subcontractor or owner of the goods.[3]

In prior cases involving this issue, the Department has considered a mix of factors such as whether the party contracting for the tolling: (a) pays the toller a processing fee; (b) purchases the raw materials and provides the materials to the subcontractor who produces the merchandise; (c) maintains title over the raw materials; (d) controls the production process in terms of specifying the quantity, type and size of the product; and (e) controls the sale of the merchandise. No one factor is controlling, and all of them need not be present, but factors such as these have led the Department to determine that tollers are not producers of the subject merchandise.[4]

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[3] *See Antidumping Duties; Countervailing Duties; Proposed Rule*, 61 FR 7330 (February 27, 1996).

[4] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails from Taiwan*, 62 Fed. Reg. 51427, 51435 (Oct. 1, 1997) ("*Collated Roofing Nails*"); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Forged Stainless Steel*

Utilities' enrichment services contracts with USEC represent a classic example of toll production.

### A. The Utilities Pay USEC A Processing Fee For Its Services

Pursuant to the enrichment services contracts, the utilities pay USEC a fee to enrich uranium. The fee itself is measured in terms of separative work units ("SWU"), which represents the measure of work required to produce the end product that was requested by the utility under the contract.[5]

### B. The Utilities Purchase The Uranium Feed Material And Provide It To USEC

The utilities purchase the uranium feed material and provide it to USEC for enrichment. USEC has suggested that the timing of the delivery of the feed material somehow indicates that it is "effectively a payment in kind" for the feed component contained in the LEU.[6] Based on the collective experience of the Utilities Group, this assertion contradicts standard contracting practice in the enrichment services industry for three principal reasons.

First, enrichment services contracts typically contain articles describing the price and terms of payment for

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*Flanges from India*, 58 Fed. Reg. 68853, 68856 (Dec. 29, 1993) ("*Flanges from India*").

[5] Separative work is the amount of effort expended upon a quantity of uranium feed in order to increase the contained assay of uranium-235 relative to that of other uranium isotopes.

[6] Petition for the Imposition of Antidumping And Countervailing Duties On Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom, Dec. 7, 2000, at I-11, 13 ("Petition").

the enrichment services (SWUs) associated with the LEU delivered.[7] There is no mention of uranium feed in either of these articles.

Second, enrichment services contracts typically require the supplier to deliver LEU that contains uranium feed of the same country of origin as the uranium feed supplied by the utility.

Third, enrichment services contracts typically provide the utility an option to pick up the uranium tails associated with the enrichment process.[8] The supplier (USEC) only obtains title to the uranium tails in the event the utility fails to exercise its option.

The Utilities Group is not aware of any contract under which a utility has agreed to pay for enrichment services with uranium, and is doubtful that USEC has reported those purported "payments" as income.[9] In the view of the Utilities Group, it cannot seriously be disputed that the utilities provide USEC with the raw material inputs and have contracted with USEC to perform a service.

Moreover, in prior cases involving tolling, the Department has never required a demonstration that the input

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[7] The article on price typically specifies the price in U.S. dollars to be paid by a utility for the quantity of SWUs associated with the LEU delivered by the supplier pursuant to the utility's enrichment order. The article on payment typically specifies the number of days following the delivery that the total price is payable.

[8] The enrichment services process produces a waste byproduct referred to as uranium tails or depleted uranium. The percentage of fissile uranium-235 contained in the tails is less than 0.711 percent, the percentage that exists in nature.

[9] The Department could easily verify this by inspecting USEC's accounting records.

products supplied by a particular company were the exact same inputs used in making the finished product, nor has it ever found that the inventory practices of the toiler were relevant in determining its status as a toiler.[10]

**C. The Utilities Maintain Title to the Uranium Feed**

The Utilities Group believes that the vast majority of utilities who have enrichment contracts with USEC maintain title to the uranium feed during the enrichment process. Utilities not only maintain title to the uranium feed, but also have property tax obligations for the uranium feed held in their accounts at USEC's facilities. For property tax purposes, utilities generally have acted consistently with what the Utilities Group believes is USEC's practice in allocating the amount of feed that resides in the states of Kentucky and Ohio on a 70-30 percent basis: 70 percent to Kentucky and 30 percent to Ohio. Thus, contrary to USEC's claims in the petition that there must be a one-for-one link between the feed and the LEU for the feed to be deemed owned by the utilities, USEC has had no problem allocating the feed between its facilities in different states for tax purposes and attributing the property tax responsibility to the utilities through allocation methodologies.

Consequently, USEC's position regarding the need to precisely trace batches of feed to a particular end product seems to vary depending on whether it suits USEC's needs in a particular context. USEC's position in this proceeding is inconsistent with commercial realities and

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[10] *See Collated Rooting Nails; see also Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Sweden*, 63 Fed. Reg. 40449 (July 29, 1998).

USEC's own practices, and the Department should reject it.

### D. The Utilities Control The Production Process For LEU

The utilities require USEC to process the uranium to meet particular requirements by specifying the "product assays," product quantity, and tails assay. The product assays typically vary for each delivery, even for deliveries to the same utility. Also, the utilities provide to USEC feed with a specific country of origin, and the finished product provided to the utilities must contain the same origin, unless otherwise agreed to by the utilities. These specifications provided by the utilities are equivalent to designating the "quantity, type and size" of the product, which the Department has determined in prior cases was sufficient to demonstrate that the party contracting for the tolling controlled the production process."[11] Consequently, because USEC is contractually obligated to enrich LEU to meet customized specifications, the utilities control the production process for purposes of the Department's tolling test.[12]

### E. The Utilities Control The Sale Of Low Enriched Uranium

Utilities control the disposition of uranium through all stages of production and sale. USEC's contracts with the utilities merely provide the price for enrichment services. The utilities incur all the costs related to the vari-

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[11] *Flanges from India* at 68856.

[12] To the extent that USEC delivers to the fabricator something other than the product assays specified by the utilities, any blending conducted by the fabricator on USEC's behalf does not relieve USEC of its contractual obligations with the utilities.

ous stages of production required to manufacture LEU, including procurement of the uranium feed material, chemical conversion of uranium in the form of $U_3O_8$ to $UF_6$, and enrichment of the uranium isotope $U_{235}$. The utilities determine where and when the LEU is delivered.

**F. Other Factors**

USEC has cited as legal support only cases that preceded the Department's express change in practice in 1996; those cases therefore are not useful precedents. Also, USEC argues that it should be considered a producer and not a toller because enrichment accounts for 60 percent of the value of the LEU, even though the Department's own explanation of the tolling regulation expressly states that the percentage of production attributable to the subcontracted operation is irrelevant.[13] Consequently, these additional USEC arguments do not provide a basis for the radical change in practice USEC is advocating.

Further support for USEC's status as a toller is found in the report of the International Trade Commission in *Uranium from Russia, Ukraine, and Uzbekistan*. The report concluded that "[f]or its enrichment services, USEC operates basically as a toll producer, enriching natural $UF_6$ owned by utilities and others worldwide and charging a fee for the SWUs it expends in the process."[14]

In light of the above, there is no doubt that USEC is a toller and not the producer of LEU, the subject mer-

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[13] 61 Fed. Reg. 7330.

[14] *Uranium from Russia, Ukraine and Uzbekistan*, Report to the Commission and Parties on Inv. Nos. 731-TA-539-C, E and F (Review) (May 25, 2000) at III-3.

chandise. Where the utilities contract with USEC to enrich their uranium feed, the utilities are the domestic producers of the resulting LEU.

## III. USEC DOES NOT MANUFACTURE MERCHANDISE, IT SELLS A SERVICE

USEC is requesting that the Department restrict imports of enrichment services in order to protect USEC's business as an enrichment service provider. USEC's petitions therefore seek relief that is outside the scope of the antidumping and countervailing duty laws, which apply only to imports of merchandise when invoked by the domestic industry that manufactures the like product.

We have explained above why, under the Department's own regulations, USEC can be considered only a toll producer of the LEU on which it performs enrichment services. Further support for the view that USEC is performing only a service on such LEU, and not producing it, is found in the fact that the activity of enrichment is treated as a service in other relevant legal contexts.

### A. USEC's Enrichment Contracts Are Services Contracts

There is no question that USEC's enrichment contracts are for the sale of services. The enrichment contracts themselves are entitled "Enrichment Services Contracts" or "Uranium Enrichment Agreements." The contracts specify that the service to be provided and the price to be paid is measured in terms of the quantity of work (*i.e.*, Separative Work Units or SWU). Under these contracts, USEC is paid only for the service it provides.

Even USEC characterizes its business as providing "uranium enrichment services." USEC's 2000 Annual Report, which it submitted as an exhibit to its petitions, states "[s]ubstantially all of USEC's revenue is derived from the sale of uranium enrichment services, denominated in SWU. Although customers may buy enriched uranium product without supplying uranium, most of USEC's contracts are for enriching uranium provided by customers."[15]

**B. USEC Has Previously Agreed That The Uniform Commercial Code Does Not Apply To Its Contracts Because They Are Not Contracts For the Sale of Goods**

At USEC's urging, the U.S. Court of Federal Claims has expressly found that USEC's enrichment contracts were for the sale of services, not goods, and therefore that the Uniform Commercial Code does not apply to those contracts. In *Barseback Kraft AB and Empresa Nacional Del Uranio S.A. v. The United States*, two foreign utilities had sued USEC (which at the time was still government-owned), claiming USEC had overcharged them for enrichment services.[16]

One of the issues raised in the case was whether the "good-faith limitation" imposed by Section 2-305(2) of the Uniform Commercial Code ("U.C.C.") constrained USEC's pricing authority. The court adopted USEC's arguments on this point, and held as follows:

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[15] USEC 2000 Annual Report 19 (2000) (provided at Petition Vol. 5, Exh. 14).

[16] *Barseback Kraft AB and Empresa Nacional Del Uranio, S.A. v. The United States*, 36 Fed. Cl. 691 (1996).

> Initially, the Court agrees with the defendant [USEC] that U.C.C. § 2-305(2) does not limit the USEC's pricing discretion because the U.C.C. simply is inapplicable to the present contracts. . . . [T]he present contracts are for uranium enrichment services, as indicated by the title of the contracts themselves. This is also indicated by what the USEC provides to its customers under the contracts. Under the contracts, the individual utilities supply the USEC with the uranium. The USEC then enriches the uranium and returns to the customer uranium enriched to the customer's specifications. The price paid by the customer is based on the number of SWUs required to enrich the uranium to the customer's specifications. It is clear, then, from the process itself, that the customers are contracting for services, not goods, from the USEC. The U.C.C. does not apply to service contracts—it applies to the purchase of goods. U.C.C. § 2-102. Accordingly, it is clear that any protections afforded to parties by the U.C.C. do not apply to the present contracts).[17]

It is difficult to see how transactions that are not treated as sales of goods under the UCC could be deemed sales of merchandise under the trade remedy law.

### C. Enrichment Service Is Not "Merchandise" Under The Customs Law

As discussed above, USEC's principal business is the sale of enrichment services—either provided by itself or by Russia. Enrichment service is not merchandise within the meaning of the trade law.

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[17] *Id.* at 705.

All goods imported into the United States must be classified into the appropriate tariff category as found in the U.S. Harmonized Tariff Schedule. There is no tariff category for enrichment service, because it is not a good.

## IV. BROKERING OF RUSSIAN SWU IS NOT PRODUCTION OF LEU

Although its arguments are not clear, USEC seems to suggest that its re-sales of the enrichment services associated with imported Russian LEU should be counted as part of USEC's "production" of LEU.[18]

In the petition, USEC stated that "it is not necessary that the enricher actually produce the enriched uranium itself." USEC goes on to cite as an example its brokering of Russian SWU:

> Petitioner, for example, delivers a large quantity of Russian enriched uranium produced through downblending of highly enriched uranium in return for payment in cash for the SWU component of the enriched uranium (which is calculated as if the enriched uranium was produced through enrichment, not downblending) and in kind for the feed material component.[19]

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[18] The Department is familiar with USEC's role as the exclusive sales agent for the SWU associated with Russian LEU downblended from High Enriched Uranium (HEU).

[19] Memorandum from Steptoe & Johnson to U.S. Department of Commerce regarding "Enrichment of Uranium Involves the Production and Sale of 'Merchandise' Subject to the Antidumping and Countervailing Duty Laws," Dec. 4, 2000, at 10-11.

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December 20, 2000

Inv. Nos. A-427-818, C-427-819,
A-412-820, C-412-821, A-428-828,
C-428-829, A-421-808, and C-421-809
Total Pages: 80
Investigation
Enforcement II/Office VI

**PUBLIC DOCUMENT**

**VIA HAND DELIVERY**

The Honorable Norman Y. Mineta
Secretary of Commerce
Attn: Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
14th Street & Constitution Avenue, N.W.
Washington. D.C. 20230

Re: Low Enriched Uranium From France, Germany, The Netherlands, And The United Kingdom, Inv. Nos. A-427-818, C-427-819, A-412-820, C-412-821, A-428-828, C-428-829, A-421-808, and C-421-809: Comments and Information On The Issue Of Industry Support

Dear Secretary Mineta:

Pursuant to 19 U.S.C. §§ 1671a(c)(4)(E) and 1673a(c)(4)(E), we are submitting to the Department of Commerce (the "Department") the following "comments or information on the issue of industry support," * * *

* * * * *

> any protections afforded to parties by the U.C.C. do not apply to the present contracts.[14]

In short, *according to USEC itself*, enriching uranium is the provision of a service, not the production of a good, and a federal court plainly relied upon these representations in rendering its determination. However, despite the obvious relevance of the precedent, USEC failed to bring the case to the Department's attention.[15]

There is nothing unique about the contracts involved in *Barseback* that would confine the argument to the facts of that case. As is noted in the *Barseback* Memorandum, the foreign contracts there at issue 'are identi-

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[14] *Id.* at 705 (emphasis added), *aff'd on other grounds*. 121 F.3d 1475 (Fed. Cir. 1997); *see also Kansas Gas & Elec. Co. v. Westinghouse Elec. Corp.*, No. 89-1738, 1990 WL 86223 at *2 (4th Cir. June 6, 1990) (stating in a contract dispute case taht "the Department of Energy was the principal supplier of enrichment services to the United States utilities, including KGE").

[15] To the contrary, the Petition raises a U.C.C. argument by stating that USEC's enrichment services "contract also includes standard disclaimers of implied warranties of the type applicable to sales of goods under the Uniform Commercial Code." Its representations that the U.C.C. is in any way applicable is inconsistent with the representations made in *Barseback*. Moreover, its statement also is irrelevant to the issue, since an implied warranty also can be disclaimed for the provision of services.

cal to those entered into with domestic uranium enrichment customers in all material respects."[16] In fact, USEC's predecessor has been entering into similar contracts since at least 1969. All of these contracts were expressly for the provision of services, not goods.[17] So far as Respondents are aware, the Petition is the first time over this entire period in which USEC stated that its enrichment services contracts are for the sale of goods, not services.

Moreover, in the prospectus for its initial public offering, which was filed with the U.S. Securities and Exchange Commission, USEC consistently informed the investing public that it was "the world leader in the production and sale of uranium fuel enrichment services for commercial nuclear power plants."[18] Not once in this

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[16] *Barseback* Memorandum at 6, *attached as* Exhibit 1.

[17] See *id.* at 15 n.15 (noting that from 1969 until 1972, there was a "standard contract," known as the "Agreement for Furnishing Uranium Enrichment Services (Requirements)", that from 1973 to 1977, there was "a new standard contract, entitled 'Agreement for Furnishing Uranium Enrichment Services (Long-Term, Fixed Commitment)', and that beginning in 1978, there was "a third standard contract, entitled 'Contract for Furnishing Uranium Enrichment Services (Adjustable, Fixed-Commitment)'").

[18] Prospectus of USEC, Inc. (July 22, 1998), *attached as* Exh. 1 to volume V of the Petition, at 5 ("USEC, a global energy company, is the world leader in the production and sale of uranium fuel enrichment services for commercial nuclear power plants."); *id.* at 32 (USEC, a global energy company, is the world leader in the production and sale of uranium fuel enrichment services for commercial nuclear power plants, with approximately 75% of the North American market and 40% of the world market."); *id.* at 52 ("The Company's goal is to continue to be the world's leading supplier of uranium fuel enrichment services and to diversify over time into related strategic businesses that will contribute to the Company's growth and profitability.").

document of more than ninety pages does USEC suggest that its enrichment activities on behalf of utilities is anything other than the provision of a service.

Moreover, in keeping its books, USEC always reports its results in terms of sales of SWUs—not of LEU. In its most recent Form 10-K filing, USEC states that with regard to utility-provided uranium, its "revenue is derived from sales of uranium enrichment services to customers who supply uranium to be enriched."[19] When processing uranium provided by utilities, USEC tracks its revenue from enrichment services and its inventory on the basis of SWUs, and not based upon a measure applicable to goods. A SWU, however, is not a tangible product: it is a calculation based on a mathematical equation that measures the amount of work done to isotopically enrich uranium. Because SWUs have no physical embodiment, they can only be construed as a measure of the services provided, and not as a good. Thus, as is noted in the *Barseback* Memorandum, the very fact that USEC sells intangible SWUs rather than tangible LEU shows that a service, rather than a good, is provided to utilities that contract for enrichment.[20]

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[19] *USEC l0-K for Fiscal Year Ended June 30, 2000* at 2; *accord id.* at 19 ("Substantially all of USEC's revenue is derived from the sale of uranium enrichment services, denominated in SWU. Although customers may buy enriched uranium product without supplying uranium, most of USEC'S contracts are for enriching uranium provided by customers."); *accord* Prospectus of USEC, Inc. at 33 ("Substantially all of the Company's revenue is derived from the sale of uranium enrichment services, denominated in SWU.").

[20] *See supra* note 12 and accompanying text.

Furthermore, for more than 45 years all three branches of the U.S. Government have treated USEC (and its predecessors) as a provider of services.

- **Congress.** Congress first allowed utilities to own uranium in 1964, when it passed the Private Ownership of Special Nuclear Materials Act, but required that utilities send all uranium to the Atomic Energy Commission (the "AEC"), USEC's predecessor, for "toll enrichment" services.[21] Section 161(v) of the Atomic Energy Act directed that the AEC "shall establish criteria in writing setting forth the terms and conditions under which *services* provided under this subsection shall be made available." Section 1202 of the Energy Policy Act of 1992 states that USEC was created for, among other things, the purpose of helping to "maintain a reliable and economic domestic source of *uranium enrichment services*."[22] Thus, Congress has always viewed USEC's purpose as providing enrichment services for uranium owned by others, a role that USEC continued to play after it was privatized.[23]

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[21] *See Private Ownership of Special Nuclear Materials Act*, Pub. L. 88-489, 78 Stat. 602 (1964).

[22] Energy Policy Act, Pub. L. 102-486, 106 Stat. 2776, 2925 (1992) (emphasis added). Section 1101 of the Energy Policy Act imposes a special assessment on domestic utilities based on the "total amount of separative work units such utility has purchased" from the DOE, thus making clear that Congress understood that the utilities always have purchased enriching services sold as SWUs from the enricher, not LEU. 42 U.S.C. § 2247g-l(c).

[23] *See Barseback*, 36 Fed. Cl. at 703 ("Congress was obviously aware that at the time the Act would take effect, there were existing contracts

- **The Executive Branch.** As is noted in the *Barseback* Memorandum, the DOE has published a series of "Uranium Enrichment Services Criteria" in the Federal Register,[24] and published regulations regarding the same.[25] In all these regulations, the U.S. government has referred to the provision of "enrichment services," thereby making clear that for at least 35 years, the utilities have been consistently contracting for enrichment services.

- **Judicial Precedents.** Numerous Federal Courts (in addition to the court in *Barseback*, discussed *supra*), evaluating various contractual and other claims, have treated USEC or its predecessors as providing 'enrichment services." For example, in *Huffman v. Western Nuclear, Inc.*, the U.S. Supreme Court, when evaluating the propriety of lifting restrictions on the importation of foreign uranium, repeatedly referred to contracts for "enrichment services."[26] Numerous

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for uranium enrichment services and the USEC would be assuming responsibility for these contracts.").

[24] *Barseback* Memorandum at 8-11, *citing* 31 Fed. Reg. 16,479 (1966); 35 Fed. Reg. 13,546 (1970); 36 Fed. Reg. 4,562 1971); 38 Fed. Reg. 12,180 (1973); 39 Fed. Reg. 38,016 (1974); 43 Fed. Reg. 27,886 (1978); 51 Fed. Reg. 3624-32 (1986); 51 Fed. Reg. 27,134 (1986), *attached as* Exhibit 1.

[25] *Barseback* Memorandum at 10; citing 10 C.F.R. § 762.5 (1986).

[26] *Huffman v. Western Nuclear, Inc.*, 486 U.S. 663, 667 (1988) (noting that utilities were "bound by long-term contracts to purchase enrichment services"); *id.* at 668 (noting that the DOE had engaged in rulemaking regarding "restriction of enrichment services"); *id.* at 669 (same).

> cases litigating section 161(v) of the Atomic Energy Act's cost recovery provisions, or involving the government's right to retroactively recover decontamination and decommissioning costs from utilities, have referred to USEC or its predecessors as providing "enrichment services."[27]

In short, regardless of the context, everyone—including USEC itself—has for decades uniformly recognized that the enrichment of uranium provided by the utilities is a service. Petitioners' assertion here that "[e]nrichment is not a 'service'" was invented solely for the Petition, and should be rejected by the Department.

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the Petition, "[t]itle to the LEU transfers from the enricher to the utility when the LEU is delivered to the

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[27] *See, e.g., Huffman*, 486 U.S. at 667-69; *Florida Power & Light Co. v. United States*, 198 F.3d 1358, 1362 (Fed. Cir. 1999) (citing "Article IV of the standard *enrichment services* contract") (emphasis added); *Consolidated Edison Co. of New York v. United States, Department of Energy*, No. 99-1464 2000 WL 1,779,085 (Fed. Cir. 2000)(noting that the recovery of decontamination costs "involves computations based on past use of Government *enrichment services*") (emphasis added); *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1572 (Fed. Cir. 1997) (noting that "[b]eginning in 1963, Yankee Atomic purchased the *uranium enrichment (or separation) services* from the Government through a series of contracts. . . . Although these contracts varied somewhat from one to another, they each stated that the price paid by Yankee Atomic for the *enrichment services* would be based on 'established Commission pricing policy.'") (emphasis added); *id.* (noting that foreign companies, USEC's prime competitors, also provide "*enrichment services*") (emphasis added); *id.* at 1583 (noting that "Yankee was to pay a fixed price per separative work unit, the common measure by which uranium *enrichment services* are sold.") (emphasis added).

utility. Prior to that point, the enricher holds title to the LEU (including work in process)."[37]

Once again, USEC makes statements in the Petition that are completely contradicted by USEC's own representations in other contexts. In its Form 10-K filed with the Securities and Exchange Commission, USEC has this to say about title to uranium it is enriching:

> *Generally, title to uranium provided by customers for enrichment purposes does not pass to USEC.* Uranium provided by customers for which title does pass to USEC is recorded on the balance sheet at estimated fair values of $101.7 million at June 30, 1999 and $40.2 million at June 30, 2000, with corresponding liabilities in the same amounts representing uranium owed to customers. *In addition, USEC holds uranium for enrichment and storage purposes with estimated fair values of $829.7 million at June 30, 1999 and $682.2 million at June 30, 2000, for which title is held by customers and others.*[38]

Thus, while USEC held title to $40.2 million in uranium on June 30, 2000 provided to it by utilities, it also held more than $680 million—*some seventeen times as much*—in inventory for utilities and for others. Clearly (and contrary to USEC's statements in the Petition), USEC's general practice is *not* to take title to uranium entrusted to it.

Moreover, USEC has taken the exact opposite position in the context of determining whether it is required to pay state property taxes. In a letter to its "enrich-

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[37] Petition vol. 1 at 1-13.

[38] USEC 10-K at 56 (emphasis added).

ment customers," USEC analyzed the tax implications of the property tax systems of Ohio and Kentucky, the two states where it maintains inventories of uranium provided by its customers for enrichment. As the USEC Letter notes, "[b]oth Ohio and Kentucky require that every owner of tangible personal property file an annual property tax return to report all property owned in the state." USEC flatly informed its customers that while it was required to "report all the property that it owns at [its two plants,] and will pay property tax accordingly," it was not required to pay property taxes on work in process inventories of uranium provided by a utility for enriching because each utility's "feed inventory" remains the "customer's feed."[39] Thus, while USEC pays property taxes on its own uranium inventory, it looks to the utilities to pay the property tax on uranium they provide to USEC for processing because the utilities continues to hold title to that material. No other conclusion is possible consistent with the tax consequences that attach to ownership.

The USEC Letter also refutes the Petition's oft-repeated claim that USEC somehow has title because the utility does not maintain ownership in a "specific, separately identifiable quantity of uranium," and thus cannot be viewed as having retained title to the material provided to USEC.[40] As the USEC Letter notes, the fungi-

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[39] Letter from USEC to Enrichment Customers (Dec. 18, 2000) at 1-2 (the "USEC Letter"), *attached as* Exhibit 2; *accord id.* at 2 stating that because the uranium remains the property of the utility, the taxes remain "your [*i.e.*, the utility] property tax obligations").

[40] Petition vol. 1 at 1-11 n.12; *accord id.* tab A at 10-11 (arguing that "the commercial activities of an enricher differ significantly from the normal commercial activities of a 'toller' " because "enrichers, unlike tollers, do not enrich the specific raw material provided by the customer").

ble nature of the product is no barrier to allocating ownership of inventory. The USEC Letter concludes:

> As you may be aware, $UF_6$ is fungible within USEC's plant operations. Although we maintain detailed accounting of your feed inventory, it is not possible to assess which customer's feed resides in each state. Our records indicate that approximately 70% of all $UF_6$ is used in Kentucky and that approximately 30% is used in Ohio, and therefore each customer's feed balance will be deemed to be split by those percentages. USEC will have these allocation percentages verified by a third party. We will provide you with your feed balance as of December 31, 1998.[41]

In short, USEC's treatment of property taxes is completely inconsistent with its position that it, rather than the utilities, maintains title to all uranium given to it for processing. The fungibility of uranium is no more a barrier to assessing ownership in the trade context than it is when property taxes are involved. The fact that the utility does not expect the return of the "specific" uranium it provides has no bearing, and is simply a reflection of the fungible nature of the product and the economics of the industry, not a desire of the utility to give up its ownership interest to USEC. The reality is that the physical identity of the feedstock is irrelevant in this

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In this regard, we note that USEC urged precisely the opposite argument in the *Barseback* case, where it argued that "[b]ecause uranium is fungible, customers do not receive from USEC the same uranium they deliver," thereby supporting its argument that when "customers receive enriched uranium from USEC, they have contracted only for the enrichment services associated with such uranium." *Barseback* Memorandum at 26, *attached as* Exhibit 1.

[41] USEC Letter at 3-4, *attached as* Exhibit 2.

business; to elevate it to the status of a *sine qua non* in applying the Department's carefully crafted tolling/sub-processor principles is to ignore that reality.

**2. USEC Does Not Control The Ultimate Use Or Sale Of The Uranium It Processes For Utility Customers**

With regard to the control element, Petitioner claims that "the utility has no control over the process used to produce the LEU that the utility receives" because "the enricher determines this [the tails] assay based on its own operational requirements and input costs."[42] According to the Petition, because USEC "chooses" how to meet the utility requirements, it should be considered the "producer" of the LEU.

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[42] Petition vol. 1, tab A at 9-10.

UNITED STATES COURT OF FEDERAL CLAIMS

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No. 95-415C
(Judge Bruggink)

BARSEBACK KRAFT AB AND EMPRESA NACIONAL DEL URANIO, S.A., PLAINTIFFS

*v.*

THE UNITED STATES, DEFENDANT

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## DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant moves for summary judgment pursuant to Rule 56(b) because no material facts are in dispute, and Defendant is entitled to judgment as a matter of law.

## STATEMENT OF THE ISSUE

Whether this Court should excise from the Contracts the unambiguous provision governing the pricing of uranium enrichment services and substitute in its place a pricing policy whose statutory basis Congress has repealed and that is contrary to the policy Congress has prescribed.

## STATEMENT OF THE CASE

### Nature Of The Case

Plaintiffs filed their complaint on June 22, 1995. In it, they contend that the United States, acting through the United States Enrichment Corporation ("USEC"), breached two virtually identical Uranium Enrichment Services Contracts (Utility Services Contracts) (the "contracts"), which were concluded in the mid-1980's

between Plaintiffs and the United States acting through the Secretary of Energy ("DOE"), * * *.

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II. This Court Should Not Impose A "Market Price"

In Count II of the Complaint, Plaintiffs argue that this court should impose a "market price" upon USEC's enrichment services. Plaintiffs argue that, if "established DOE pricing policy" were deemed to have been eliminated by the repeal of section 161v, the price term of the Contracts would be "open," and, therefore, under the Uniform Commercial Code, this Court should establish a "reasonable price" based on what Plaintiffs assert is the "market price" for enrichment services. (Complaint ¶¶ 60-68.) For several reasons, this alternative argument is also wrong.

A. The Uniform Commercial Code Is Not Applicable

The U.C.C. does not apply in government contract cases. *GAF Corp. v. United States*, 932 F.2d 947, 951 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 1071 (1992) ("Congress has not applied the Uniform Commercial Code to federal contracts. . . . The Claims Court may not do by judicial fiat what Congress has not done by legislation."). Moreover, Article 2 of the Uniform Commercial Code governs only contracts for the sale of goods; it does not govern contracts for services. *U.C.C.* § 2-102. The contracts are, as their very title indicates, "Uranium Enrichment *Services* Contracts," and the procedures under the Contracts support the conclusion that the Contracts are not contracts for goods. When Congress enacted the Private Ownership of Special Nuclear Materials Act,

Pub. L. No. 88-489, Aug. 26, 1964, it permitted utilities to own uranium; prior to this legislation, enriched uranium could only be leased from the government. Under the Contracts, customers deliver natural uranium to USEC (formerly to DOE) and receive in return uranium enriched to their specifications. Because uranium is fungible, customers do not receive from USEC the same uranium they deliver; the price that they pay is computed based solely on the number of SWU's needed to enrich natural uranium to the level they desire. There is no charge for the uranium itself. Thus, although customers receive enriched uranium from USEC, they have contracted only for the enrichment services associated with such uranium. Accordingly, the U.C.C. is inapplicable.

B. Even If the U.C.C. Were Applicable, There Is No Price Gap

The Plaintiffs claim that, under U.C.C. § 2-305(2), where the price term of a contract is open, the price must be set "in good faith," and this standard is met by the application of a "market price." The problem for Plaintiffs is that the price term in the Contracts is simply not open. "[N]ot every contract which does not specify an exact price is subject to modification under § 2-305. When the contracts stipulate that the price will be set according to a particular standard, section 2-305 has no role to play." *Kellam Energy, Inc. v. Duncan*, 668 F. Supp. 861, 877 (D. Del. 1987). This is exactly the * * *.

* * * * *

[Logo Omitted]
USEC

November 19, 1998

[REDACTED]

Dear [REDACTED]

The enclosed property tax information has been compiled for USEC's enrichment customers and is being provided for your information. Included in the packet are: a copy of the letter sent to USEC enrichment customers, a listing of property tax contacts, two memorandums regarding the "work in progress" exemption and tax forms for Ohio and Kentucky.

If you have any questions, please use me as your contact point. I can be reached by telephone at (301) 564-3407 or by facsimile at (301) 564-3207.

Sincerely,

/s/ BRYAN DEOMS
BRYAN DEOMS
Customer Service Representative

Enclosures

Contract File ..... ☐
Vault ..... ☐
[ILLEGIBLE] Center .. ☐
Chron. Binder ..... ☐
Quote Book ..... ☐
CC: _____

6903 Rockledge Drive, Bethesda, MD 20817-1818
Telephone 301-564-3200 Fax 301-564-3201
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Offices in Livermore, CA Paducah, KY

Portsmouth, OH Washington, DC

Letter to USEC Enrichment Customers

The purpose of this letter is to provide you with our understanding regarding certain aspects of the Kentucky and Ohio property tax as imposed on uranium inventories for enrichment at USEC Inc.'s two gaseous diffusion plants (GDP's). Both Kentucky and Ohio require that every owner of tangible personal property file an annual property tax return to report all property owned in the state as of January 1. Neither Ohio or Kentucky uses a rolling average inventory method, except for "manufacturers" and "merchants." The Kentucky property tax return is due on May 15, and the Ohio property tax return is due on April 30, although the Ohio dates are subject to modification for certain tax-payers who have fiscal year-ends, rather than calendar year-ends.

Property tax payment schedules and tax rates vary between the two states. In Ohio, the taxpayer must pay one half of the tax due at the time that it files its tax return. The second half payment is due on September 20. No payment is due in Kentucky until the end of the year, when the state sends a tax bill to the taxpayer. The tax rates for Kentucky and Ohio are .05% and approximately 1.1%, respectively, of the fair market value of the raw goods inventory in place on January 1.

USEC will begin to pay property tax in both Ohio and Kentucky effective January 1, 1999. As required by law, USEC will report all the property that it owns at the two GDP's and will pay property tax accordingly. USEC does not intend to report any $UF_6$ to which it does not hold legal title. We have attached the 1998 property tax forms for both Ohio and Kentucky to provide you with more information about both states' property tax rules and procedures. We have been advised that the 1999

property tax forms will be available early in 1999 and may be obtained either by calling the appropriate tax office or by viewing the appropriate internet site.

We have done extensive work with our corporate Tax Department in understanding the Ohio and Kentucky property tax. As a part of this review, our corporate Tax Department has advised that Ohio tax law supports USEC's customers treating $UF_6$ which it owns (as opposed to leases) as exempt property for purposes of the Ohio property tax. We have enclosed a summary memorandum which discusses this important issue. We have also enclosed a memorandum covering leased feed material.

Although we are pleased to be able to share this information regarding the Kentucky and Ohio property tax with you, USEC is prohibited from providing tax, legal, or accounting advice to its customers. We strongly encourage you to engage your own property tax representatives, consultants, or counsel in Ohio and in Kentucky if you consider your firm's tax liability substantial enough to warrant such an engagement. We would be pleased to refer you to law firms and accounting firms with whom we are familiar in both states.

As you may be aware, $UF_6$ is fungible within USEC's plant operations. Although we maintain detailed accounting of your feed inventory, it is not possible to assess which customer's feed resides in each state. Our records indicate that approximately 70% of all $UF_6$ is used in Kentucky and that approximately 30% is used in Ohio, and therefore each customer's feed balance will be deemed to be split by those percentages. USEC will have those a location percentage verified by a third party. We will provide you with your feed balance as of De-

cember 31, 1998, as soon as our quarterly feed report is completed. It is our understanding that the ending balance on December 31 is typically used to satisfy the January 1 reporting obligation.

USEC continues to work to manage the property tax liabilities for the property located at the two GDP's. At this time, we are exploring various methods of reducing your property tax obligations, including having both GDP's designated as "foreign trade zones". It is our understanding that the Ohio property tax on inventory is not imposed on property located in a foreign trade zone.

[FOR OFFICIAL FILE]

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[December 26, 2000]

Inv. Nos. A-427-818, C-427-819,
A-412-820, C-412-821, A-428-828,
C-428-829, A-421-808, and C-421-809
Total Pages: 21
Pending Investigation
Enforcement II/Office VI

**PUBLIC DOCUMENT**

**VIA HAND DELIVERY**

The Honorable Norman Y. Mineta
Secretary of Commerce
Attn: Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
14th Street & Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Low Enriched Uranium From France, Germany, The Netherlands, And The United Kingdom, Inv. Nos. A-427-818, C-427-819, A-412-820, C-412-821, A-428-828, C-428-829, A-421-808, and C-421-809: Information And Comments On The Issue Of Industry Support

Dear Secretary Mineta:

This filing is provided on behalf of Eurodif S.A. (a provider of enrichment services in France), COGEMA (a seller thereof), and COGEMA, Inc. (a seller of enrichment services in the United States and, in that connection, an importer of low enriched uranium ("LEU") that has been enriched in France), as well as Urenco Deutschland GmbH, Urenco Nederland B.V., and Urenco (Capenhurst), Ltd. (providers of enrichment services in Germany,

* * * * *

[Logo Omitted]
USEC

December 8, 1997
Case No. A-834-802
Suspension Agreement (Corrected Version)

PUBLIC DOCUMENT

BY HAND DELIVERY

The Honorable William M. Daley
Secretary of Commerce
U.S. Department of Commerce
14th Street and Constitution Ave., N.W.
Attn: Central Records Unit
Room B-099
Washington, D.C. 20230

Re: Uranium from Kazakhstan

Dear Secretary Daley:

At the request of the U.S. Department of Commerce (the "Department"), the United States Enrichment Corporation ("USEC") submits the following comments on the recently initialed amendment to the above-captioned suspension agreement.

USEC strongly supports efforts by the Department to include provisions in the various suspension agreements to permit U.S. converters, enrichers and fabricators to process CIS origin uranium for foreign customers, even where such uranium could not have otherwise been imported for sale or consumption in the United States. To date, USEC has not objected to any of the amendments

made to the suspension agreements to permit such activities, provided they were clearly tailored to ensure that the imported material did not adversely affect other segments of the U.S. nuclear fuel industry.

USEC has followed with interest the requests submitted by the Government of Kazakhstan and others regarding the scope of the authority granted under the reexport provisions of the Kazakhstani suspension agreement. Based on the information in the public record, the requests appear to center on unique transactions. Accordingly, USEC has seen no reason to object to these transactions thus far.

The proposed amendment, however, appears to grant authority beyond the authority needed for these unique transactions and raises a number of fundamental concerns for USEC (especially when compared to the reexport provisions of the amendment to the Russian suspension agreement). First, for reasons stated more fully below, the increase in the amount and duration of imports authorized under the amendment, coupled with the relaxation of the requirement that specific end-users be identified in advance for all temporary imports of uranium, could be used in a manner that would have an adverse impact on USEC and others in the U.S. nuclear fuel industry.

Second, notwithstanding the prohibition in the amendment against imports for "sale . . . in the United States", the authority to import uranium into the United States without identifying an end-user in advance could be used by a broker or processor to make such sales. Third, the amendment's relaxation of the end-user rules and the authority granted in the amendment for swapping of imported uranium will significantly impair the

Department's ability to effectively track the uranium imported. Finally, it is not clear how the amendment will be interpreted in light of conflicting provisions in the Russian suspension agreement.

We recognize that there is a legitimate need for a clarification of the scope of the reexport provisions of the Kazakhstan suspension agreement, and we support the Department's efforts to provide such clarification. However, while we have no reason to believe that any of the parties who have requested this clarification intend to use the reexport authority in a manner that could be harmful to other segments of the nuclear fuel industry, we believe there are potential loopholes and inconsistencies that could lead to such problems, as more fully described below. These matters should be addressed before the Department finally agrees to the amendment.

1. Adverse Consequences on U.S. Industry

USEC's concerns about the impact of the amendment on the U.S. industry are rooted in the manner in which transactions in uranium are conducted in the nuclear fuel industry. The enriched uranium used to fabricate nuclear fuel assemblies typically is not provided by the fabricators themselves. Rather, utilities arrange for enriched uranium to be provided to fabricators by USEC and other enrichers. Because enriched uranium is considered a fungible commodity, the uranium delivered by an enricher for a utility is typically not the same uranium used to fabricate fuel for that utility. In fact, a fabricator may use its own inventory of enriched uranium or enriched uranium delivered by other utilities to partially or completely fabricate the fuel bundles, pending receipt of the utility's enriched uranium. This use of inventory is perfectly legitimate, but it never shows up in the docu-

mentation of the final delivery to the utility, so long as either (i) the utility's enriched uranium is delivered before the fabricated fuel is delivered by the fabricator or (ii) if the enriched uranium arrives after delivery of the fabricated fuel, the transfer documentation (the DOE/NRC Form 741) is corrected to reflect the origin of the utility's enriched uranium instead of the origin of the enriched uranium in the fuel. Indeed, because all enriched uranium is treated as fungible, the fabricator can legitimately report that the fuel delivered to the utility contains the enriched uranium delivered by the enricher for the utility, even though in reality the utility's enriched uranium merely was used to replenish the fabricator's inventories. From the foregoing explanation, it should be clear that the size of a fabricator's inventory determines the length of the time the fabricator can do without a utility's uranium in the fabrication of assemblies for that utility. With a large enough inventory, the fabricator can permit utilities to defer the delivery of enriched uranium until immediately before or even after the delivery of the assemblies to the utility. In the nuclear fuel business, this has real economic value to utilities, because the longer utilities can defer the delivery of enriched uranium to the fabricator, the longer they can defer purchases of uranium, conversion and enrichment from U.S. and other non-CIS suppliers. Because most suppliers contract with utilities on the basis of needs within fixed periods of time (with prices varying according to the time period in which the purchase occurs), the ability to defer a purchase means that the purchase can be shifted into years in which prices are lower, or years in which the utility is not committed to purchase from U.S. suppliers (thereby creating an artificial leverage over the suppliers in price negotiations for uncommitted

years and reducing the suppliers' revenues in committed years).

It is this aspect of the nuclear fuel business which makes it necessary to require an end-user certificate for temporary imports. End-user certificates effectively limit an importer's ability to keep enriched uranium in inventory for an indefinite period. If material is dedicated to a specific transaction and is exported within the specified period of time, it cannot remain in inventory for use in the manufacture of other assemblies or otherwise be used to create leverage over U.S. suppliers.

2. Domestic Sales

It should also be clear from the foregoing explanation that enriched uranium *per se* is generally not sold within the United States. Instead, utilities typically obtain nuclear fuel by purchasing natural uranium and conversion, enrichment and fabrication services separately. In the past, USEC has not objected to the reexport provisions included in the various suspension agreements because the end-user certificate requirement served to ensure that the imported material was used to obtain services from U.S. converters, enrichers and fabricators. In such transactions, we assume the foreign utility holds title to the uranium and is only providing it to the U.S. processor so that the processor can perform a value-added service.

Under the amendment, however, a processor (such as a fabricator) or a broker could import material for its own account and hold it pending identification of an end-user (*i.e.*, after import of the material) to whom the uranium could be provided. In this scenario, the processor or broker, not the utility, would actually be the supplier of the uranium. If the processor or broker receives any form of

consideration (for example, money or other uranium) in exchange for the uranium (including the enrichment component of the uranium), it would appear that the processor or broker has sold the material to the utility. Further, if title to the material transfers to the utility while the material is in the United States, that also suggests that a sale has occurred.

The amendment states without qualification that material imported under the reexport provision is not for "sale . . . in the United States." From USEC's perspective, a processor or broker who imports material for its own account and then, in consideration for either money or equivalent material, supplies the material to a foreign customer who is not identified until after the material is in the United Stares is making a sale of the material in the United States. The fact that the material will ultimately be exported is irrelevant, since it is consumed in the United Stares in a manufacturing process prior to export. Moreover, nothing in the amendment suggests that the amendment's prohibition on sales in the United States does not apply to sales of material for export.

3. Inability to Track

As preceding sections indicate, uranium is a difficult commodity to track. Once it enters a processor's inventory, it generally is commingled and loses any separate identity. Indeed, once made part of the processor's inventory, it may be converted to other chemical forms to make it more suitable for future use by the processor. Further, its characteristics (chemical form and assay) may change during the processing of the material (e.g., conversion from $UF_6$ to $UO_2$).

Processors track material by country of origin, but these records reflect aggregate totals of each origin within the processor's inventory. The origin ascribed to a particular quantity of physical enriched uranium (*i.e.*, uranium in a container or in processing machinery) may actually change over time. This ability to change origins is absolutely essential to ensure the efficient operation of a nuclear fuel business. For example, Russian SWU is typically delivered to U.S. utilities by exchanging Russian enriched uranium for natural uranium supplied by the utility. As a result of this exchange, the Russian enriched uranium's natural uranium component is treated as if it were the non-Russian natural uranium delivered by the utility, while the non-Russian natural uranium delivered by the utility is deemed to acquire a Russian origin.

This same flexibility on origins, however, makes it difficult to track the actual use or disposition of imported uranium. For example, a quantity of imported Kazakhstani material in a processor's inventory could be "reexported" by the simple expedient of locating an equivalent quantity of material outside the United States and then swapping the origin designation of each quantity of material. The material remaining in the processor's inventory would now be treated as having other than Kazakhstani origin. Effectively tracking the further disposition of this material would be virtually impossible, however, particularly if the swap involved an exchange of Kazakhstani origin for U.S. origin (given the large quantities of U.S. origin material in processor inventories in the United States.)

USEC does not advocate unnecessary restrictions on the operations of processors, who must be free to commingle

and use any material placed in their inventories. With an end-user requirement, however, the Department at least has the assurance that the addition of the material to the processor's inventory is necessary to accommodate work that the processor must perform for a specific foreign utility and that the processed material will be exported within a specific period of time. Further, by excluding or limiting swaps, the Department could have greater assurance that it could track the disposition of material under the amendment and preclude adverse effects on the U.S. industry.

4. Inconsistency with the Russian Suspension Agreement

Aside from USEC'S concerns about the impact of the amendment on the U.S. industry, USEC is also concerned about the lack of coordination of this amendment with the Russian suspension agreement. As pointed out in USEC's comment of November 5, 1997 regarding certain uranium oxide powder sought to be imported from Kazakhstan, uranium enriched in Russia—wherever located—is still considered to be Russian origin uranium under the Russian suspension agreement and can only be imported if (i) matched with sales of equivalent enriched uranium or (ii) covered by a re-export certificate issued by the Russian Federation pursuant to the reexport provisions of the Russian suspension agreement.

Because the uranium suspension agreements constitute separate proceedings, the Kazakhstani agreement—no matter how amended—simply does not create an exception to the Russian suspension agreement. Rather, an entry of enriched uranium from Kazakhstan which was enriched in Russia would be subject to the requirements of both agreements. In other words, even if the Kazakh-

stani government issued a re-export certificate to cover the importation of Kazakhstani origin uranium enriched in Russia, the material could not be imported unless the Russian government also issued a re-export certificate covering the enriched material. Further, neither the enriched uranium, nor its enrichment component could be swapped for other enriched uranium or SWU or sold in the United States, unless such swap or sale was matched with a swap or sale of an equal amount of U.S. origin enriched uranium or SWU.

* * * * *

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Inv. Nos. A-427-818, C-427-819-412-820, C-412-821, A-428-828, C-428-829, A-421-808 & C-421-809
Total No. of Pages: 30
Pending Investigation
Office 6/ Group 2

**PUBLIC DOCUMENT**

December 27, 2000

**VIA HAND DELIVERY**

The Honorable Norman Y. Mineta
Secretary of Commerce
Attn: Import Administration
U.S. Department of Commerce, Room 1870
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Low Enriched Uranium From France
Low Enriched Uranium From, Germany,
Low Enriched Uranium From the Netherlands
and
Low Enriched Uranium From the United Kingdom

Dear Secretary Daley:

On behalf of USEC Inc. and United States Enrichment Corporation (collectively, "USEC"), we offer the following brief rebuttal to the points raised by the Respondent in * * *.

[Logo Omitted]

April 8, 1998
Case No. A-834-802
Total No. of Pages: 10
Suspension Agreement

**PUBLIC DOCUMENT**

BY HAND DELIVERY
The Honorable William M. Daley
Secretary of Commerce
U.S. Department of Commerce
14th Street and Constitution Ave., N.W.
Washington, D.C. 20230
Attn: Import Administration
Central Records Unit
Room B-099

Re: Uranium from Kazakhstan

Dear Secretary Daley:

This letter responds to the public version of the March 24, 1998 letter of the Government of Kazakhstan ("GOK")[1] regarding a proposed transaction under Appendix A of the Suspension Agreement between the United States and the GOK (the "Suspension Agreement").[2]

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[1] Letter from Thomas B. Wilner, Shearman & Sterling to the Hon. William M. Daley (March 24, 1998) (the "Appendix A Letter").

[2] Agreement Suspending the Antidumping Investigation on Uranium from Kazakhstan, 57 Fed. Reg. 49,222 (Oct. 30, 1992), as amended.

USEC supports efforts by the Department to afford the GOK and other countries that have entered into suspension agreements in the uranium cases the opportunity to continue exporting their products to the United States where such exports are consistent with applicable U.S. law and the international obligations of the United States. Accordingly, we did not object to the various amendments made to the suspension agreement with the Russian Federation (the "Russian Suspension Agreement")[3] in 1994[4] and 1996[5] which increased the Russian Federations's opportunity to sell uranium products and separative work units ("SWU"), in the United States, and expanded the authority for temporary imports of Russian uranium for processing and export. Similarly, we would not oppose any interpretation or amendment of the Kazakh Suspension Agreement that would provide expanded opportunities for the export of Kazakh uranium to the United States provided such exports do not result in the suppression or undercutting of prices of domestic products and comply with all applicable laws and international obligations.

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[3] Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation, 57 Fed. Reg. 49235 (Oct. 30, 1992).

[4] Amendments to the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation, 59 Fed. Reg. 15373 (April 1, 1994) (providing for matched sales of certain Russian uranium products.)

[5] Amendments to the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation, 61 Fed. Reg. 56665 (Nov. 4, 1996) (extending the matched sales program and providing for sales of natural uranium consistent with the USEC Privatization Act).

In its March 24 letter, however, the GOK has sought to justify a transaction with an interpretation of the Kazakh Suspension Agreement, which does not meet the foregoing criteria.[6] In particular, the GOK claims that a 1995 amendment to the Kazakh Suspension Agreement concerning the origin of Kazakh uranium enriched in a third country supersedes a pre-existing provision of the Russian Suspension Agreement which confers Russian origin on all uranium enriched in Russia. Under this interpretation, exporters of enriched Kazakh uranium are only bound by restrictions to which the GOK has specifically agreed. Thus, these exporters can export Kazakh uranium enriched in Russia without regard to any limitation not expressly set forth in the Kazakh Suspension Agreement—in contrast to exporters of other uranium enriched in Russia, who would be bound by the Russian Suspension Agreement.

For reasons stated more fully below, USEC believes the GOK's interpretation is legally unsupportable, unreasonably under the circumstances and undermines the fundamental objectives of both the Russian Suspension Agreement and the Kazakh Suspension Agreement. The interpretation should be rejected.[7]

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[6] Due to its confidential nature, USEC has not been given access to the details of the transaction described in the GOK's March 24 letter. Thus, USEC is unable to comment directly on the transaction, although we have asked our outside counsel to provide such comments in our stead.

[7] USEC notes that the issue of the proper origin of Kazakh enriched uranium has already been extensively briefed in this proceeding. See, e.g., Letter from Richard Kingdon to the Hon. William M. Daley (Mar. 10, 1998); Letter from Richard Kingdon to the Hon. William M. Daley (Dec. 8, 1997). Unless the Department has specific questions concerning the parties' analysis, USEC believes that the Department has all

1. The GOK's Interpretation is Legally Unsupportable

In its March 24 letter, the GOK suggests that, because the GOK is not a party to the Russian Suspension Agreement, uranium from Kazakhstan cannot be subject to the Russian Suspension Agreement's terms. USEC disagrees. While the GOK itself may not be bound by the Russian Suspension Agreement in making exports of Kazakh uranium to the United States, any party importing enriched uranium into the United States is subject to all applicable restrictions, including those imposed by the Russian Suspension Agreement.[8] Whether or not the GOK has agreed to these restrictions is irrelevant. They are conditions imposed on the shipment of material into the United States. Thus, whoever the importer is, it must provide all required documentation for the import, including GOK export certificates for the natural uranium content of the imported material as well as Russian export certificates if the uranium was enriched in Russia. The GOK cannot use the fact that it is not a party to the Russian Suspension Agreement in order to exempt importers from requirements that would otherwise apply to the imported material.

In addition,, nothing in the Kazakh Suspension Agreement, or its various amendments, states that the parties intended to supersede other requirements applicable to imports into the United States. Indeed, the Kazakh Suspension Agreement only requires the De-

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the information necessary to make a decision on this issue.

[8] For instance, importers of Kazakh uranium are required to file a certification that the imports of such material do not circumvent, inter alia, the Russian Suspension Agreement. See Amendments to the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation, 61 Fed. Reg. 56,665, 56,666 (Nov. 4, 1996).

partment to extend "fair and equitable treatment for Kazakhstan vis-a-vis other countries that export uranium to the United States, taking into account all relevant factual and legal considerations, including the antidumping laws of the United States." 57 Fed. Reg. 49222, 49224 (Oct. 30, 1992) (emphasis supplied). Thus, in evaluating the proper interpretation of the Kazakh Suspension Agreement, it is appropriate for the Department to consider all circumstances, including the impact of the GOK's interpretation upon the Russian Suspension Agreement and the need to ensure that applicable legal requirements are met (see discussion below).

2. The GOK Interpretation is Unreasonable

In its March 24 letter, the GOK appears to argue that, because the 1995 amendment did not expressly state that Kazakh uranium enriched in Russia would be subject to the Russian Suspension Agreement, the Russian Suspension Agreement is not applicable. USEC believes it is unreasonable to interpret the language in such a manner.

First, such an interpretation would place the Russian Federation at a clear disadvantage, since it would give Kazakh uranium enriched in Russia a preferred status over any other uranium enriched in Russia, including Russian uranium. Given the importance of the Russian Suspension Agreement to both the U.S. and Russian governments, it could not have been the Department's intent to give Kazakhstan such a preference or create such an exemption to the Russian Suspension Agreement, particularly since the Russian Suspension Agreement, as amended in 1994 (i.e., prior to the amendment relied upon by the GOK) provides that it is the parties' intent that Russia be accorded treatment no less favor-

able than any other Republic of the former Soviet Union that has a suspension agreement with the United States. . . ." 59 Fed. Reg. 15373, 15377 (Apr. 1, 1994). Further, if the Department had intended to create an opening for Russian-enriched uranium to be exported under the Kazakh Suspension Agreement, it would be reasonable to expect that the Department would have also addressed such exports in a manner similar to the provisions of the 1994 amendment, which permitted sales of enriched uranium and SWU, but only on a matched basis.

Second, at the time the Kazakh Suspension Agreement was amended to add the language relied upon by the GOK, the Russian Suspension Agreement expressly provided that "uranium enriched . . . in the Russian Federation . . . [is] covered by this Agreement, regardless of subsequent modification or blending." 57 Fed. Reg. 49235 (Oct. 30, 1992). The GOK must have been aware of this fact, if the GOK expected in good faith that the 1995 amendment would supersede the Russian Suspension Agreement, it is reasonable to expect that the GOK would have addressed the inconsistency with the Department at the time.

Finally, as discussed more fully below, the GOK's interpretation could result in the undercutting or suppression of prices for enriched uranium or its enrichment component. Since the fundamental objective of the Kazakh Suspension Agreement is to prevent such undercutting or price suppression, it is reasonable to insist on an interpretation that would frustrate this purpose.

In short, the GOK's attempt to give meaning to the absence of language addressing the Russian Suspension Agreement ignores the circumstances surrounding the

adoption and implementation of the amendment. The Department is not bound to interpret the Kazakh Suspension Agreement in such a narrow fashion. Instead, it should choose an interpretation which implements the underlying statutory requirements (discussed in greater detail below) and does not undermine any other suspension agreement.

3. The GOK Interpretation Undermines the Fundamental Purposes of the Russian an dKazakh Suspension Agreements

The Department's authority to enter into suspension agreements is set forth in Section 734 of the Tariff Act o f1930, as amended. 19 U.S.C. § 1673c. It provides, inter alia, that the Department may only suspend an investigation of imports from a non-market economy such as Kazakhstan if the Department determines (i) the agreement is in public interest; (ii) effective monitoring of the agreement by the United States is practicable; and (iii) the agreement will prevent the suppression or undercutting of domestic prices of the merchandise under investigation. *Id.* § 1673c(1). The statute further provides that a public interest determination includes a consideration of the impact of the agreement on U.S. consumers, on the international economic interests of the of the United States and on the competitiveness of the domestic industry producing the like merchandise (including any impact on employment and investment in that industry). *Id.* § 1673c(a)(2).

The preamble to both the Russian and Kazakh Suspension Agreements include the required determinations:

> The Department finds that this Agreement is in the public interest; that effective monitoring of this Agreement by the Department is practicable; and that this Agreement will prevent the suppression or undercutting of price levels of domestic uranium products by imports of merchandise subject to this Agreement.

57 Fed. Reg. 49222 (Oct. 30, 1992) (Kazakh Suspension Agreement); 57 Fed. Reg. 49235 (Oct. 30, 1992) (Russian Suspension Agreement). The "merchandise subject to this Agreement" referred to in the preceding excerpt includes enriched uranium.

The interpretation proposed by the GOK would undermine each of these required determinations. First, the Kazakh Suspension Agreement could no longer be said to serve the public interest if, as the GOK proposes, it is interpreted to create a means to circumvent the Russian Suspension Agreement. Second, given the fungibility of uranium, it would be difficult to monitor whether uranium enriched in Russia in fact was produced from Kazakh uranium or uranium of other origins. Third, permitting the importation of enriched uranium, subject only to the Appendix A limits on the natural uranium used to produce the enriched uranium, clearly threatens to undercut the price of enriched uranium in the United States. The Appendix A limits are tied only to the price of natural uranium.[9] The price of enriched

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[9] In the nuclear fuel cycle, the price of enriched uranium is represented by the price of the natural uranium and the enrichment required to produce the enriched uranium. Utilities typically purchase each component separately, although enrichers typically produce the utilities' enriched uranium before the natural uranium is delivered.

uranium is subject to other factors, including the price of enrichment, which the Kazakh Suspension Agreement does not address.[10] Thus, permitting the importation of enriched uranium without regard to the price of enriched uranium or its SWU components invites the price suppressing effects that the Russian Suspension Agreement avoids. Indeed, in our most recent filing with the Department in this processing, we included an article from a trade publication which indicates the price suppressive effect of the availability of this Kazakh material.[11]

In closing, USEC would like to address a semantic argument raised by the GOK concerning the scope of the Russian Suspension Agreement. At one point in its letter, the GOK argues that enriched uranium located in Kazakhstan at the time of the break-up of the former Soviet Union cannot be subject to the Russian Suspension Agreement, because enrichment occurred in the former Soviet Union and not "in the Russian Federation" (the language used in the Russian Suspension Agreement). This is a specious argument. By this time logic, uranium would not be covered by the Kazakh Suspension Agreement if it were mined prior to the break

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Thus, while ostensibly selling just the enrichment component, the enricher actually supplies the enriched uranium in return for (i) payment for the enrichment plus (ii) natural uranium to replace the natural uranium used by the enricher to produce the enriched uranium.

[10] Undoubtedly, this is due to the fact that, at the time the Kazakh Suspension Agreement was adopted, the Department had no reason to believe that the GOK would argue that the Kazakh Suspension Agreement exempted Russian-enriched uranium from the limits under the Russian Suspension Agreement.

[11] Letter from Richard Kingdom to the Hon. William M. Daley (Mar. 10, 1998).

up of the Soviet Union in the territory now know as Kazakhstan because the Kazkah Suspension Agreement only refers to "uranium from Kazakhstan" and not uranium from the former Soviet Union. That could hardly have been the intent. Rather, as we have argued elsewhere in this submission, the Kazakh Suspension Agreement and the Russian Suspension Agreement need to be given a practical interpretation that takes all surrounding circumstances into account, including the statutory requirements that underlie the Department's authority to enter into suspension agreements and the need to ensure that suspension agreements are not interpreted in a way that undermines other international obligations of the United States. Results-oriented technical readings of these agreements should be rejected out of hand. Further, given the fungibility of uranium, making a distinction between enriched uranium from before and after the break up of the Soviet Union would render it impossible for the Department to monitor the suspension agreements to ensure compliance with the applicable restrictions.

For the foregoing reasons, we respectfully request the Department reject the GOK's request for approval of the proposed transaction, or any similar transaction that may be submitted in the future.

This letter has been served on parties to this proceeding as indicated by the attached certificate of service. Please do not hesitate to contact the undersigned if you have any questions concerning this submission.

Sincerely,

/s/ RICHARD O. KINGDON
RICHARD O. KINGDON
Vice President, Marketing
& Sales

cc: Mr. Joseph Spetrini

## CERTIFICATION

In accordance with 19 C.F.R. § 353.31(i)(1), I Richard O. Kingdon, Vice President, Marketing and Sales, currently employed by the United States Enrichment corporation, certify that (1) I have read the attached submission, and (2) the information contained in this submission is, to the best of my knowledge, complete and accurate.

/s/ RICHARD O. KINGDON
RICHARD O. KINGDON
Date: April 8, 1998

BEFORE THE
UNITED STATES DEPARTMENT OF
COMMERCE INTERNATIONAL TRADE
ADMINISTRATION

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Inv. No. A-821-802

IN THE MATTER OF URANIUM FROM THE RUSSIAN FEDERATION

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Sunset Review
Document contains no business proprietary information.

**PUBLIC DOCUMENT**

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**REBUTTAL OF USEC INC. TO THE SUBSTANTIAL RESPONSES TO THE NOTICE OF INITIATION OF SUNSET REVIEW FILED BY MINATOM, ET AL. AND THE AD HOC UTILITIES GROUP**

Pursuant to 19 C.F.R. § 351.218(d)(4), this Rebuttal is filed on behalf of USEC Inc. and its subsidiary United States Enrichment Corporation (collectively, "USEC"), domestic interested parties in the above-captioned five-year ("sunset") review, to the responses filed in this proceeding by the Ministry of the Russian Federation for Atomic Energy, AO Techsnabexport, and Globe Nuclear Services and Supply GNSS, Limited (collectively "Minatom") and the Ad Hoc Utilities Group ("AHUG") to the Notice of Initiation issued by the Department of Commerce ("Department").[1] In addition, USEC joins in

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[1] See 64 Fed. Reg. 41915 (Aug. 2, 1999).

the rebuttal comments filed by the Ad Hoc Committed of Domestic Uranium Producers.

* * * * *

U.S.C. § 1675(a)(1)(C) at any time, which it did not do.[47] It is this process, and not a sunset review, which is the appropriate procedure for calculation of a dumping margin.

In sum, launching simultaneous—or, more logically, sequential—investigations of whether Russia remains a nonmarket economy and whether Russian uranium has been sold at dumped prices in some recent period would be unprecedented, unwarranted, and, ultimately, inconclusive of the determination the Department is required to make in this sunset review.

## IV. OTHER ISSUES RAISED BY MINATOM AND AHUG LACK MERIT OR ARE NOT RELEVANT TO THE DEPARTMENT'S ANALYSIS OF WHETHER DUMPING WOULD CONTINUE OR RECUR IF THE SUSPENSION AGREEMENT WERE TERMINATED.

### A. The Domestic Industry Firmly Supports the Continuation of the Russian Suspension Agreement and Has Adequately Responded to the Department's Notice of Initiation.

Minatom and, to a lesser degree, AHUG allege that this sunset review does not have the support of the domestic industry, an allegation the respondents suggest

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[47] That section provides that, upon request, the Department will "review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any . . . dumping margin involved in the agreement."

the Department confirm with a determination of industry support. Minatom's contention is based on two erroneous presumptions. First, Minatom and AHUG argue that USEC is not a producer, and therefore should not be considered part of the domestic industry.

Second, they argue that the unique circumstances of this case suggest that the Department make a new support determination, a determination from which USEC's views should be rejected on the grounds that it is an importer of the subject merchandise. For the following reasons, Minatom's and AHUG's arguments should be rejected.

**1. USEC is a producer of the domestic like produce and has the right to participate in the case.**

USEC (and its predecessor, the U.S. Department of Energy ("DOE")) has participated in this proceeding and in the Russian Suspension Agreement as a domestic interested party for over seven years. USEC has commented on amendments to the suspension agreement, and on individual transactions conducted thereunder. Counsel for USEC has requested, and been granted, access to business proprietary information under the administrative protective order in these proceedings as a representative of a domestic producer. Now, for the first time in history of this case, USEC's standing to participate in this proceeding is being challenged on the grounds that USEC is not a member of the domestic industry. This argument is simply absurd. USEC is a "domestic interested party," and as such is fully entitled to participate in this sunset review.

The determination of which companies are entitled to participate in a sunset review begins with an analysis of the merchandise subject to the proceeding. In this re-

view, the merchandise subject to the Suspended Investigation includes "uranium enriched in $U_{235}$ and its compounds.[48] For this proceeding, the "domestic like product"—the "product which is like . . . the article subject to an investigation"—includes enriched uranium. Because USEC is a domestic producer of enriched uranium, a domestic like product, USEC is by definition a domestic interested party,[49] and as such is entitled to participate in this sunset review.[50]

Minatom questions USEC's right to participate in this proceeding because, in Minatom's words, USEC is not a "'producer' of uranium in any traditional sense."[51] It is certainly indisputable that USEC produces en-

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[48] Uranium from Kazakhstan, Kyrgyzstan, Russia, Taijkistan, Ukraine, and Uzbekistan: Suspension of Investigations and Amendment of Preliminary Determinations, 57 Fed. Reg. 49220, 49221 (Dep't Commerce 1992); Russian Suspension Agreement, 57 Fed. Reg. at 49235.

[49] The definition of "domestic interested party" in 19 C.F.R. § 351.102(b) includes an "interested party" as described in section 771(9)(C) of the Tariff Act of 1930—"a manufacturer, producer, or wholesaler in the United States of a domestic like product." 19 U.S.C. § 1677(9)(C).

[50] 19 C.F.R. § 351.218(d). This conclusion also refutes Minatom's argument that the Paper, Allied-Industrial, Chemical & Energy Workers International Union ("PACE") should not be deemed an interested party in this proceeding. See Minatom Resp. at 6-7. USEC also notes that PACE represents workers at Allied Signal's uranium conversion plant in Metropolis, Illinois, yet another producer of the domestic like product. See Letter from Philip H. Potter to the Hon. William M. Daley at 2 (Aug. 17, 1999). PACE is the successor to the Oil, Chemical and Atomic Workers International Union, AFL-CIO ("OCAW"), which was an original petitioner in the 1991 proceeding. Id. Having accepted OCAW (now PACE) as a petitioner for over seven years, it would make no sense to disqualify them now.

[51] Minatom Resp. at 4.

riched uranium. In fact, its gaseous diffusion plants in Portsmouth, Ohio, and Paducah, Kentucky, produce no commercial product other than enriched uranium, and USEC is the only commercial producer of enriched uranium in the United States. Minatom appears to base its objections on the fact that while USEC produces enriched uranium, it sells "services."[52] This argument was address, and soundly rejected, by the ITC in the preliminary injury determination in Uranium from the U.S.S.R.[53] In that investigation, respondents argued that the Department of Energy (the precursor to USEC) "is not a 'producer,' but merely provides the 'service' of enrichment."[54] The ITC dismissed that argument with one appropriate word—"spurious"—and concluded that the DOE was a "producer."[55] The same analysis employed by the ITC in its preliminary injury determination, and apparently applied by the Department throughout the term of the Suspension Agreement, is equally applicable to this sunset review. There can be no question that USEC is entitled to participate in these proceedings and that it is part of the domestic uranium industry.

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[52] Minatom claims that USC provides, and derives revenue from, "services," and is thus "in an entirely different posture than the mining interests that filed the petition." Id. at 3. AHUG makes a comparable argument. AHUG Resp. at 15 n.14.

[53] Inv. No. 731-TA-539 (Prelim.), USITC Pub. No. 2471 at 9 (Dec. 1991).

[54] Id.

[55] Id. The ITC found that, in prior cases, producers manufacturing products on a "tolled" basis were fully qualified to participate as domestic producers.

**UNITED STATES DEPARTMENT OF COMMERCE**
**International Trade Administration**
**Washington, D.C. 20230**

A-427-818, C-427-819,
A-412-820, C-412-821,
A-428-828, C-428-829,
A-421-808, C-421-809
Investigations
Public Document

Date: December 27, 2000

Memorandum for: Holly A. Kuga
Acting Deputy Assistant Secretary
AD/CVD Enforcement, Group II

From: Melissa G. Skinner s/MGS
Director
AD/CVD Enforcement Office 6

Subject: Determination of Industry Support for the Antidumping and Countervailing Petitions on Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom

## I. Summary

The Department of Commerce (the Department) has received petitions requesting initiation of antidumping (AD) and countervailing duty (CVD) investigations on low enriched uranium (LEU) from France, Germany, the Netherlands, and the United Kingdom. We have examined the extent of industry support for each of the petitions, and recommend finding there is adequate industry support for each.

## II. Background

On December 7, 2000, the Department of Commerce (the Department) received petitions filed in proper form by USEC Inc. and its wholly owned subsidiary, United States Enrichment Corporation (referred to hereafter as the petitioner). On December 26, 2000, petitioner amended its petitions to include the Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC, and Local 5-550 and Local 5-689 (collectively PACE). In a separately filed letter, PACE joined in the petitions on December 26, 2000. The petitioner requested the imposition of AD and CVD duties on imports of LEU from France, Germany, the Netherlands, and the United Kingdom.

Several parties submitted comments and rebuttal comments concerning industry support.

Specifically, on December 19, 2000, the Ad Hoc Utilities Group (Utilities Group[1]) representing several U.S. utility companies, filed comments, arguing that the utility companies qualify as domestic producers of LEU, but made no statement as to its interested party status under 771(9)(C) of the Tariff Act of 1930, as amended, (the Act). On December 20 and 26, 2000, Eurodif/Cogema and Urenco filed comments and rebuttal comments on industry support based upon their claims of interested party status under section 771(9)(A) of the Act, each as "a foreign manufacturer, producer, or exporter, or United States importer of subject merchandise." USEC filed rebuttal comments on industry support on December 21 and 22, 2000.

At the request of the governments of France, Germany, the Netherlands, and the United Kingdom, we held consultations, under 19 C.F.R § 351.202(i)(2) of the Department's regulations, with delegations from these governments, as well as the Delegation of the European Commission, on December 21, 2000 concerning the CVD petitions. During the consultations, these governments and the Delegation of the European Commission voiced the same arguments related to industry support as submitted by the Utilities Group, Eurodif/Cogema, and Urenco.[2]

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[1] The Utilities Group includes: Arizona Public Service Co.; Carolina Power & Light Co.; Commonwealth Edison Co.; Consumers Energy; Dominion Generation; Duke Energy Corp.; DTE Energy; Entergy Services, Inc.; First Energy Nuclear Operating Co.; Nuclear Management Co.; PSEG Nuclear LLC; Southern Nuclear Operating Co.; Union Electric Company (d/b/a/ AmerenUE); and Wolf Creek Nuclear Operating Corp.

[2] *See* the December 22, 2000, Memorandum, "Consultations with the Delegation of the European Commission and the Governments of

III. Objections to Submission by the Utilities Group

In its letter of December 21, 2000, USEC argues that the Utilities Group does not qualify as an interested party under section 771(9) of the Act. USEC argues that the Utilities Group meets none of the definitions under the statute. USEC claims that the Utilities Group is a consumer of the subject merchandise and that in the Department's sunset review, members of the Utilities Group previously termed themselves "industrial users" in accordance with section 777(h) of the Act, not producers of uranium. USEC argues that because only interested parties are permitted to submit comments on standing to bring a petition, and because, by their own admission and the Department's determination in the sunset review, the members of the Utilities Group do not qualify as producers of the domestic like product, their comments should be stricken from the record.

The Department only accepts comments concerning industry support for a petition prior to initiating an investigation from persons who would qualify as an interested party under section 771(9) if an investigation were initiated. In this case, the comments provided by the Utilities Group focused on the issue of industry support, and in particular, the utility companies' status for purposes of industry support, either as domestic producers or industrial users and consumers of the domestic like product. Thus, we accepted the comments filed by the Utilities Group for the limited purpose of determining their status in this case. However, the Department's limited

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France, Germany, the Netherlands, and the United Kingdom Regarding the Countervailing Duty Petition on Low Enriched Uranium."

acceptance of the submission does not confer producer status upon the Utilities Group.

## IV. Applicable Statutory/Regulatory Requirements

Sections 702(c)(4)(A) and 732(c)(4)(A) of the Act provides that the Department shall determine that the petition has been filed by or on behalf of the industry if:

> (i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and
>
> (ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.

Sections 351.203(e)(1)-(5) of the Department's regulations provide further guidance with respect to determining industry support. We reference specific provisions below, as applicable, in discussing our methodology for determining industry support in these cases.

## V. Definition of U.S. Industry

Section 771(4)(A) of the Act defines the relevant industry as "the producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."[3] In order to determine whether there is adequate industry sup-

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[3] 19 U.S.C. § 1677(4)(A).

port for the petitions, it is necessary to first identify the domestic like product and then examine that industry's production.

A. Domestic Like Product

Section 771(10) of the Act defines domestic like product as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title."[4] In this case, the domestic like product that corresponds to the imports covered by the petitions is low enriched uranium, which is described as uranium hexafluoride (UF6) with a U235 product assay of less than 20 percent that has not been converted into another chemical form, such as UO2, or fabricated into nuclear fuel assemblies.

* * * * *

that are licensed to enrich uranium.[7] Accordingly, USEC is the only company in the United States with the technology and the technical expertise necessary to produce LEU. And, all LEU produced in the United States must be enriched by USEC.

Further, the information on the record indicates that enrichment is a major manufacturing process in the production of LEU, responsible for a substantial portion of the total value of LEU;[8] and that

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[4] 19 U.S.C. § 1677(10).

[7] USEC's Dec. 20, 2000 submission at 8, citing to the NRC's "Nuclear Materials and Waste Fact Sheets: Fuel Facilities."

[8] Petitioners, citing to *Uranium from Kazakhstan*, Inv. No. 731-TA-539-A, USITC Pub. No. 3213 at I-4 to I-5 (July 1999), estimate that enrichment accounts for 60 percent of the total value of LEU. Petition at I-9.

enrichment is a necessary process for the production of LEU. Finally, we note that the product output from enrichment facilities is LEU, as defined in the petition.

In light of the fact that USEC is the only entity in the United States that enriches converted uranium to produce LEU; is the only entity with the technology and technical expertise to produce LEU; that enrichment is a necessary and major manufacturing process in the production of LEU; and that the product output from USEC's enrichment facilities constitutes the domestic like product, we find that USEC is the only producer of LEU in the United States. Accordingly, we determine that petitioner accounts for 100 percent of LEU production in the United States.

Moreover, on December 26, 2000, PACE joined the AD and CVD petitions, thereby establishing an independent basis for industry support. PACE represents the workers at the only two enrichment facilities in the United States. Accordingly, the Department is satisfied that USEC and PACE provide sufficient industry support for initiation of these petitions.

## VI. Opposing Views on Industry Support

### a. *The Department's "tolling" regulation*

The Utilities Group advances several arguments seeking to demonstrate that, under the Department's "tolling" regulation,[9] utility companies

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[9] 19 C.F.R. § 351.402(h) (2000).

qualify as producers of LEU. The Utilities Group provides no argument as to why the tolling regulation should be applied for purposes of industry support.

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**[FOR OFFICIAL FILE]**

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**PUBLIC DOCUMENT**
Investigation Nos. A-427-818, C-427-819, A-412-820, C-412-821, A-428-828, C-428-829, A-421-808, C-421-809
Total Number of Pages: 51
Investigation
Office6/Group II

April 5, 2001

**VIA HAND DELIVERY**

The Honorable Donald L. Evans
Secretary of Commerce
Attention: Import Administration
Central Records Unit
Room 1870
U.S. Department of Commerce
14th Street & Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Antidumping and Countervailing Duty Investigations: Low Enriched Uranium From France, Germany, the Netherlands and the United Kingdom

Dear Secretary Evans:

This letter is submitted on behalf of the Ad Hoc Utilities Group ("Utilities Group")[1] in response to submissions by the petitioner commenting on the scope of the Department's investigation and the content of the Department's questionnaires to the respondents.

Many of USEC's comments and suggested additions to the antidumping questionnaire are based on its argument that purchases of enrichment services by utilities should be treated as sales of goods. The Utilities Group disagrees, and believes it is vital that the Department understand the nature of the enrichment services contracts. Members of the Utilities Group are parties to these contracts, and therefore are uniquely well-positioned to comment on this subject.

This submission addresses the following issues:

1. The Department must only compare sales of subject merchandise, not services.

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[1] The members of the Ad Hoc Utilities Group are Arizona Public Service Co., Carolina Power & Light Co., Dominion Generation, Duke Energy Corp., DTE Energy, Entergy Services, Inc., Exelon Corporation (the newly formed entity combining Commonwealth Edison Co. and PECO), First Energy Nuclear Operating Co., Florida Power Corp., Florida Power and Light Co., Nuclear Management Co. LLC (on behalf of its members [*sic*] companies Alliant Energy Nuclear, LLC, Consumers Energy, NSP Nuclear Corp., WEC Nuclear Corp., and WPS Nuclear Corp.), Pennsylvania Power and Light, PSEG Nuclear LLC, South Texas Project, Southern California Edison, Southern Nuclear Operating Co., Union Electric Co. (d/b/a/ AmerenUE) and Wolf Creek Nuclear Operating Corp.

2. The Department should not rely upon information requested in the antidumping questionnaires related to services contracts.

3. There is multilateral agreement that uranium enrichment is a service, and the U.S. government has agreed with this position in negotiating the General Agreement on Trade in Services ("GATS").

## I. THE "MERCHANDISE" SUBJECT TO INVESTIGATION IS THE SALE OF LEU, NOT ENRICHMENT SERVICES

The purpose of the antidumping law is to determine whether "a class or kind of foreign *merchandise*[2] is being, or is likely to be, *sold* in the United States at less than fair value."[3] If the Department finds that *sales of merchandise* are made at less than fair value, the statute authorizes the Department to impose a duty "upon such merchandise in an amount equal to the amount by which *normal value* exceeds the *export price for the merchandise*."[4]

Accordingly, the antidumping law is structured to compare *sales of subject merchandise* in the relevant

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[2] "*Subject merchandise*" is defined as "the class or kind of *merchandise* that is within the scope of an investigation. 19 U.S.C. § 1677(25) (emphasis added).

[3] 19 U.S.C. § 1673. Dumping is specifically defined under the statute as "the *sale* or likely sale of *goods* at less than fair value." 19 U..S.C. § 1677(34) (emphasis added).

[4] 19 U.S.C. § 1673. The dumping margin is defined under the statute as the "amount by which the normal value exceeds the export price or the constructed export price of the *subject merchandise*." 19 U.S.C. § 1677(35)(A) (emphasis added).

foreign country market ("normal value") with *sales of the subject merchandise* in the United States ("export price" or "constructed export price"). "Normal value" is defined as "the price at which the 'foreign like *product*'[5] is first *sold* . . . in the exporting country."[6] "Export price" is defined as the "price at which the *subject merchandise* is first *sold* in the United States . . . by a seller not affiliated with the producer or exporter."[7] Because the Department must evaluate *sales of the subject merchandise*, the Department's questionnaire should request information related to *sales of the subject merchandise*, not sales of services.

In this case, the subject merchandise is low enriched uranium ("LEU"). However, virtually all of the respondents' transactions with their utility customers is in the form of services contracts to enrich uranium feed material (that is, the $U_3O_8$ the utilities purchase from mining companies and arrange to have converted into $UF_6$) provided to the respondents by the utilities. The same holds true for the utilities' contracts with USEC.

The fact that the utilities' enrichment services contracts with the enrichers are for the sale of services, not merchandise, is demonstrated by the following:

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[5] "Foreign like product" means "merchandise." 19 U.S.C. § 1677(16).

[6] 19 U.S.C. § 1677b(1)(B)(i) (emphasis added).

[7] 19 U.S.C. § 1677a(a) (emphasis added). "Constructed export price" is the "price at which *subject merchandise* is *sold* in the United States . . . by a seller affiliated with the producer or exporter to a purchaser not affiliated with the producer or exporter." 19 U.S.C. § 1677a(b).

- The utilities' contracts with the enrichers are entitled "Enrichment Services Contracts" or "Uranium Enrichment Agreements."[8]
- The utilities pay the enrichers a fee to enrich uranium owned by the utilities based on the amount of work required (SWU—separative work units), not the quantity of uranium. The utilities are only invoiced for the enrichment services provided. There is no document or invoice that evidences a sale of uranium feed.
- The utilities purchase the uranium feed material, arrange and pay for its conversion, and provide the converted uranium and pay a fee to the enrichers. The utilities maintain title to the uranium throughout the enrichment process.
- Although the market for uranium feed material is volatile, enrichment services contracts do not address or account for fluctuations in the value of the feed material. If the enrichers truly were contracting for a product, the contracts would have to address changes in uranium feed values.
- Unless otherwise agreed, enrichment services contracts require enrichers to deliver finished LEU containing uranium feed material of the same country of origin as that delivered by the utility.
- The enrichers are merely bailees for the uranium feed material owned by the utilities. The utilities

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[8] *See, e.g., Barseback Kraft AB v. United States*, 36 Fed. Cl. 691, 704 (1996) (The court concluded that "the present contracts are for uranium enrichment services, as indicated by the title of the contracts themselves.")

may trade their feed with other utilities while it is held by the enrichers.

- Where an enricher sells LEU as a product, the contracts differ materially from enrichment services contracts. For sales of LEU as a product, for example, the utilities may only specify the assay of the LEU. For sales of enrichment services, the utilities specify both the assay of the LEU and the assay of the tails, which dictates the amount of uranium feed to be provided by the utility as well as the amount of work to be performed by the enricher on each unit of uranium feed. The utilities may freely adjust the LEU assay, tails assay, and quantity of uranium feed for each delivery and generally do so depending on the relative prices of uranium feed, enrichment services, and tails flexibility.
- USEC has argued, and the U.S. Court of Federal Claims agreed, that USEC's enrichment contracts were for the sale of services, not goods, and therefore nor covered by the Uniform Commercial Code.[9]

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[9]The court in *Barseback* concluded:

> Under the contracts, the individual utilities supply the USEC with the uranium. The USEC then enriches the uranium and returns to the customer uranium enriched to the customer's specifications. The price paid by the customer is based on the number of SWUs required to enrich the uranium to the customer's specifications. It is clear, then, from the process itself, that the customers are contracting for services, not goods, from the USEC. The U.C.C. does not apply to services contracts—it applies to the purchase of goods.

*See Barseback* at 705.

In an attempt to capture sales of enrichment services in the Department's investigation of LEU, USEC is urging the Department to re-characterize sales of enrichment services as sales of LEU for cash and "in kind payments" of feed. But sales of services cannot be re-characterized in this manner. As demonstrated above, the terms of the enrichment services contracts are clear—utilities are not providing "in kind payments" of uranium feed material. Rather, they are providing the feed material to which enrichment services will be applied. The fact that this feed material may be fungible does not preempt or in any way modify the essential terms of the contract—a contract for enrichment services, not for LEU.[10]

The terms of the antidumping law require the Department to compare sales of merchandise to determine whether dumping has occurred. The enrichment services contracts at issue are not sales of merchandise, and nothing can change that fact. Because there is no legal basis for the Department to apply the antidumping law to the sale of services, the only sales relevant to the

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[10] USEC's arguments about the fungibility of uranium prove too much. When a grain elevator owner stores corn and wheat for a farmer and provides ground cattle feed on demand, the grain elevator owner does not return the same kernels of corn or grains of wheat to the farmer. But the grain elevator owner does not assert that it "owns" the grain held in storage or that it "sells" ground cattle feed to the farmer that is withdrawn and ground. Similarly, when a bank customer withdraws cash he or she previously deposited, the bank does not return the exact same cash to the customer. Nonetheless, the bank does not assert that it "owns" the cash it holds on deposit for its customers, or that it "sells" the cash that is withdrawn from accounts. The grain elevator owner and the bank—like the enrichers—provide storage and processing services for a fee.

Department's analysis are sales of the *subject merchandise*—LEU.[11]

## II. THE DEPARTMENT SHOULD NOT RELY ON QUESTIONNAIRE RESPONSES RELATED TO SERVICES CONTRACTS IN CONDUCTING ITS ANTIDUMPING ANALYSIS

We have identified below particular examples of questions in the antidumping questionnaire that inappropriately seek information on sales of services rather than sales of merchandise. It is important that the Department be aware of the implications of these questions as it undertakes the process of reviewing the respondents' questionnaire responses.

### A. Requests For Information Based On Mischaracterizations Of Enrichment Services Contracts

As discussed above, USEC has argued that the uranium feed material utilities deliver to enrichers for enrichment should be deemed as "payment in kind" for the uranium feed material the enrichers deliver hack to the

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[11] The countervailing duty law is equally inapplicable to the respondents' services contracts with the utilities. The purpose of the countervailing duty law is to counteract subsidies bestowed with respect to *merchandise*, not services. 19 U.S.C. § 1671(a)(1). The Department's questionnaire requests information on the value of the *subject merchandise* sold to all markets during the period of investigation. Section I II, Part I.C. To the extent that the Department's countervailing duty questionnaire treats enrichment services contracts as contracts for the sale of subject merchandise, the same problem arises as with the antidumping questionnaire. As noted above, where the respondents provide enrichment services, they do not sell the subject merchandise and do not know the actual full value of the subject merchandise because the utilities supply the enrichers with the uranium feed.

utilities as LEU, and on that basis that the utilities are "buying" LEU from the enrichers. Based on USEC's mischaracterization of the services contracts, the Department's questionnaire requests information on "shipments of LEU pursuant to SWU contracts where the value of feed uranium is not specified."[12] This question is nothing more than a thinly veiled attempt by USEC to have the Department collect information on contracts for services.

Moreover, the Department's questionnaire requests information on the quantity of SWU "contained in" LEU.[13] However, SWU is not "contained in" LEU; rather, SWU is the measure of the amount of work required to enrich uranium to a particular assay. The fact that SWU, and not a quantity of LEU, is the consideration passing to the utilities under the contracts demonstrates beyond question that the contracts are not for merchandise, and that the enrichment services provided by the respondents are not "relevant sales."

As explained in detail above, enrichment services contracts, by their own terms, are for enrichment services only, and the great majority of those contracts require the utilities to retain legal title to the uranium feed material they deliver to the enrichers for a variety of reasons.[14] The Utilities Group is not aware of any con

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[12] Section D, Attachment 2A.

[13] In Sections B and C, the Department requests that the respondents report "the number of SWU contained in each delivery, as specified in sales documentation." Section B and C, Field 22.0.

[14] Retention of legal title to feed material is especially important to the providers of enrichment services for tax reasons. In 1975, the state of Tennessee assessed a property tax of approximately $13.5 million on an inventory of enriched uranium owned by the Japanese government

tract under which a utility has agreed to pay for enrichment services with cash and uranium. The feed material is purchased by the utility, pursuant to individual contracts with unique terms, conditions and pricing, and delivered to enrichers for processing only. The suppliers of the feed material are not affiliated with the respondents, and the enrichers do not know the value of the uranium feed material delivered to them—a value that varies considerably.[15] Finally, the utilities can and do sell feed material amongst each other after delivery to the enricher without the enricher's consent, and financing entities may have a security interest in feed material delivered to the enricher, without the enricher's consent.

For these reasons, responses to questions soliciting information about deliveries under enrichment services contracts are irrelevant to the Department's antidumping analysis.

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and stored in that state. *See* Kwitny, Jonathan, *Even Helping Hands Can Suffer Tax Bite in U.S., Japan Finds; Purchase of Uranium Services to Aid Our Trade Balance, Sets Off A Local Reaction*, The Wall Street Journal, Oct. 28, 1975, at A1, 31. Enrichers, including USEC, are anxious to avoid any risk of this type of liability.

[15] In fact, the feed material may be purchased well in advance of its required delivery time to the enricher and stored in inventory by the utility. Thus, the value of the feed acquired by the utilities may differ dramatically from the feed price at the time the LEU is delivered. Moreover, the amount of SWU services purchased for a particular delivery is directly linked to the value of the feed material acquired by the utility's selection of the tails assay, as discussed *supra*. If the price of the feed is lower, relatively more SWU services are purchased, and vice-a-versa. Consequently, USEC's claim that the feed value is a "wash" misrepresents the purchasing practices of the industry.

**B. Request For The Calculation Of The "Entered Value Of Subject Merchandise"**

In contrast to its established practice, the Department, at USEC's request, has asked the respondents to provide information on how they calculate "entered value of the subject merchandise for U.S. Customs purposes."[16] Where the respondents are selling the subject merchandise (*i.e.*, LEU as a product), the value of that LEU must be based on the contract price, which the Department already is obtaining through other questions. Therefore, this question appears designed only to obtain information on deliveries under enrichment services contracts where the contract does not contain a total value for the LEU.

When delivering LEU pursuant to enrichment services contracts, however, the respondents do not know the *actual* full value of the LEU they deliver; they only know what they are charging to enrich the uranium. The utilities do not share with them the costs incurred by the utilities in purchasing the $U_3O_8$ from mining companies and in arranging for the toll conversion service for that $U_3O_8$. Any estimates of uranium feed value used by the respondents to satisfy customs law requirements when delivering LEU pursuant to services contracts are irrelevant to * * *.

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[16] Section A, Question 4(m): "How does your company calculate entered value of the subject merchandise for U.S. Customs purposes? Please submit documentation for your most recent entry illustrating the manner in which entered value is calculated."

### B. WTO Members, Including The United States Use The CPC Classification System As The Basis For Identifying Services Sectors (Including Energy Services) Under The GATS

Although the original purpose of the CPC was to provide a framework for the international comparison of statistics dealing with goods and services, the members of the World Trade Organization ("WTO") have adopted the CPC coding system for purposes of identifying services sectors covered by the GATS.[26]

The GATS is the first binding multilateral agreement (not including regional trade agreements) regulating international trade in services. The agreement covers virtually all services that are traded internationally. The GATS defines trade in services broadly as encompassing all trade in services by any of the following four modes:

- Cross-Border Supply: services supplied from one country to another;
- Consumption Abroad: consumers making use of services in another country;
- Commercial Presence: foreign companies creating subsidiaries or branches to provide services in another country; and
- Presence of Natural Persons: individuals traveling from their own country to supply services in another.

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[26] *See GATT Secretariat's Services Sectoral Classification List*, MTN.GNS/W/120. *See* Exhibit 2.

The utilities' purchase of enrichment services from the respondents is trade in services through the modes of "consumption abroad" and "cross-border supply."

Obligations under the GATS include (1) those that apply to all services covered by the GATS ("general obligations"), and (2) those that apply only to specific service sectors for which governments have undertaken listed commitments in schedules attached to the GATS "specific commitments").

In the context of the GATS, the U.S. government considers uranium enrichment to be a service. In a recent submission to the WTO on objectives for further GATS negotiations, the U.S. government submitted a statement of its views regarding the continued negotiation on energy services.[27] In its paper, the U.S. government defined energy services as "those services involved in the exploration, development, extraction, *production*, generation, transportation, transmission, distribution, marketing, consumption, management, and efficiency *of* energy, *energy products and fuels*."[28] The U.S. government further stated that the classification of energy services under the GATS should "incorporate all energy services and energy-related service activities provided for within W/120" (*i.e.*, the UN CPC code list used as the basis for GATS commitments and incorporated into the WTO document system as document number MTN.GNS/W/120). The index attached to the U.S. negotiation paper specifically identified CPC category 884

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[27] Communication from the United States on Energy Services, WTO Council for Trade in Services Special Session, WTO Doc. S/CSS/W/24 (Dec. 18, 2000). *See* Exhibit 3.

[28] *Id.* at Section 1A. (emphasis added).

as an energy service, which is the category that covers uranium enrichment.

In light of the above, if the Department included sales of uranium enrichment services within the scope of the antidumping law, it would be taking a position contrary to the position of the U.S. government in the context of the GATS. Moreover, it should be noted that all WTO members use the CPC coding system as the basis for scheduling commitments for trade in services. Consequently, if the U.S. government does not maintain a consistent approach in its interpretation of what is covered by the GATS, the entire system of commitments under that agreement may be undermined.

## CONCLUSION

The arguments advanced by USEC would require the Department to ignore the requirement of the antidumping law to compare sales of merchandise. There is no basis in the antidumping law to create a sale of merchandise where none exists. Accordingly, the Department should disregard USEC's attempts to persuade the Department to ignore the antidumping statute and the regulations.

Recognizing the legitimate contracting practices of the nuclear fuel cycle industry would not lead to the "circumvention superhighway" suggested by USEC. The purpose of the circumvention provision of the antidumping law is to prevent companies from changing their behavior to escape antidumping liability. For decades, the utilities have separately purchased and arranged for the services provided by the various stages of the nuclear fuel cycle: utilities did not suddenly change their purchasing practices to avoid application of the trade laws. Rather, it is USEC that is trying to con-

vince the Department that it should ignore the consistent and established practice of the nuclear industry of contracting for the purchase of enrichment services. The Department should not be misled by USEC's attempts to justify applying the trade law to services based on a circumvention theory that has no basis.

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[Receiver __ 11, 1996]

*DEPARTMENT OF INTERNATIONAL ECONOMIC AND SOCIAL AFFAIRS*

*STATISTICAL OFFICE OF THE UNITED STATES*

**STATISTICAL PAPERS** **Series M No. 77**

# PROVISIONAL CENTRAL PRODUCT CLASSIFICATION

[Logo Omitted]
**UNITED NATIONS**
**New York, 1991**

# II. DETAILED STRUCTURE: SECTION, DIVISIONS, GROUPS, CLASSES AND SUBCLASSES

000027

| Group | Class | Subclass | Title | Corresponding ISIC | Corresponding BS | Corresponding SITC |
|---|---|---|---|---|---|---|
| | | | articles, blotting-pads, binders, file covers, forms and other articles of stationery, of paper or paperboard | | | |
| 327 | 3270 | 32700 | Composed type, prepared printing plates or cylinders, impressed lithographic stones or other impressed media for use in printing | 2222 | 8442.50 | 726.35 |
| DIVISION 33 | | | COKE OVEN PRODUCTS; REFINED PETROLEUM PRODUCTS; NUCLEAR FUEL | | | |
| 331 | 3310 | 33100 | Coke and semi-coke of coal, of lignite or of peat; retort carbon | 2310 | 2704 | 325 |
| 332 | 3320 | 33200 | Tar distilled from coal, from lignite or from peat, and other mineral tars | 2310 | 2706 | 335.21 |
| 333 | | | Petroleum oils and oils obtained from bituminous materials, other than crude; preparations n.e.c. containing by weight 70% or more of these oils, such oils being the basic constituents of the preparations | | | |
| | 3331 | 33310 | Motor spirit (gasolene) including aviation spirit | 2320 | | 334.11 |
| | 3332 | 33320 | Spirit type (gasolene type) jet fuel | 2320 | | 334.12 |
| | 3333 | 33330 | Other light petroleum oils and light oils obtained from bituminous minerals (other than crude); light preparations n.e.c. containing not less than 70 per cent by weight of petroleum oils or oils obtained from bituminous minerals (other than crude), these oils being the basic constituents of the preparations | 2320 | | 334.19 |
| | 3334 | 33340 | Kerosene (including kerosene type jet fuel) | 2320 | | 334.21 |
| | 3335 | 33350 | Other medium petroleum oils and medium oils obtained from bituminous minerals (not kerosene), other than crude; medium preparations n.e.c. containing not less than 70 per cent by weight of petroleum oils or oils obtained from bituminous minerals (other than crude), these oils being the basic constituents of the preparations | 2320 | | 334.29 |
| | 3336 | 33360 | Gas oils | 2320 | | 334.3 |
| | 3337 | 33370 | Fuel oils n.e.c. | 2320 | | 334.4 |



Best Available Copy

| Group | Class | Subclass | Title | Corresponding ISIC | BS | SITC |
|---|---|---|---|---|---|---|
| | 3334 | 33340 | Lubricating petroleum oils and oils obtained from bituminous minerals, other heavy petroleum oils and heavy oils obtained from bituminous minerals (other than crude), and heavy preparations n.e.c. containing not less than 70 per cent by weight of petroleum oils or oils obtained from bituminous minerals (other than crude), these oils being the basic constituents of the preparations | 2320 | | 334.5 |
| 334 | | | Petroleum gases and other gaseous hydrocarbons, except natural gas | | | |
| | 3341 | 33410 | Propane and butanes, liquefied | 2320 | 2711.12,.13 | 342 |
| | 3342 | 33420 | Ethylene, propylene, butylene, butadiene and other petroleum gases or gaseous hydrocarbons, except natural gas | 2320 | 2711.14,.19, .29 | 344 |
| 335 | 3350 | 33500 | Petroleum jelly; paraffin wax, microcrystalline petroleum wax, slack wax, ozokerite, lignite wax, peat wax, other mineral waxes, and similar products; petroleum coke, petroleum bitumen and other residues of petroleum oils or of oils obtained from bituminous materials | 2320 | 2712<br>2713 | 335.1, .41,.42 |
| 336 | | | Radioactive elements and isotopes and compounds; alloys, dispersions, ceramic products and mixtures containing these elements, isotopes or compounds; radioactive residues | | | |
| | 3361 | 33610 | Natural uranium and its compounds; alloys, dispersions, ceramic products and mixtures containing natural uranium and its compounds | 2330 | 2844.10 | 525.11 |
| | 3362 | 33620 | Uranium enriched in U235 and its compounds; plutonium and its compounds; alloys, dispersions, ceramic products and mixtures containing uranium enriched in U235, plutonium or compounds of these products | 2330 | 2844.20 | 525.13 |
| | 3363 | 33630 | Uranium depleted in U235 and its compounds; thorium and its compounds; alloys, dispersions, ceramic products and mixtures containing uranium depleted in U235, | 2330 | 2844.30 | 525.15 |



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| Group | Class | Subclass | Title | Corresponding ISIC | CPC | SITC |
|---|---|---|---|---|---|---|
| | | | thorium or compounds of these products | | | |
| | 3369 | 33690 | Other radioactive elements and isotopes and compounds; alloys, dispersions, ceramic products and mixtures containing these elements, isotopes or compounds; radioactive residues | 2330 | 2844.40 | 525.19 |
| 337 | | | Fuel elements (cartridges), for or of nuclear reactors | | | |
| | 3371 | 33710 | Fuel elements (cartridges), non-irradiated, for nuclear reactors | 2330 | 8401.30 | 718.77 |
| | 3372 | 33720 | Spent(irradiated) fuel elements (cartridges) of nuclear reactors | 4010 | 2844.50 | 525.17 |
| DIVISION 34 | | | BASIC CHEMICALS | | | |
| 341 | | | Basic organic chemicals | | | |
| | 3411 | 34110 | Hydrocarbons and their halogenated, sulphonated, nitrated or nitrosated derivatives | 2411 | 2901-2904 | 511 |
| | 3412 | 34120 | Industrial monocarboxylic fatty acids; acid oils from refining | 2411 | 1519.11-.20 | 431.31 |
| | 3413 | 34130 | Alcohols, phenols, phenol-alcohols, and their halogenated, sulphonated, nitrated or nitrosated derivatives; industrial fatty alcohols | 2411 | 1519.30<br>2905-2908 | 512.11-.14,<br>.17,.19,<br>.21,<br>.23-.29,<br>.3,.4 |
| | 3414 | 34140 | Carboxylic acids and their anhydrides, halides, peroxides and peroxyacids and their halogenated, sulphonated, nitrated or nitrosated derivatives, except salicylic acid and its salts and esters and their salts | 2411 | 2915-2917<br>2918.11-.19,<br>.29,.30,<br>.90 | 513.7,.8,<br>.91,.92,<br>.94-.96 |
| | 3415 | 34150 | Amine-function compounds; oxygen-function amine-compounds, except lysine and its esters and salts thereof and glutamic acid and its salts; ureines and their derivatives and salts thereof; carboximide-function compounds and imine-compounds; nitrile-function compounds; diazo-, azo- or azoxy-compounds; organic derivatives of hydrazine or of hydroxylamine; compounds with other nitrogen function | 2411 | 2921<br>2922.11-.30,<br>.49,.50<br>2924.21<br>2925-2929 | 514.5,<br>.61-.63,<br>.65,.67,<br>.73,<br>.82-.89 |
| | 3416 | 34160 | Organo-sulphur compounds and other organo-inorganic compounds; heterocyclic compounds n.e.c. | 2411 | 2930<br>2931<br>2932.11-.19,<br>.21,.90 | 515.4,.5,<br>.61,.62,<br>.69,<br>.73-.75, |

| Group | Class | Subclass | Title | Corresponding ISIC |
|---|---|---|---|---|
| | | 87905 | Translation and interpretation services | 7499 |
| | | 87906 | Mailing list compilation and mailing services | 7499 |
| | | 87907 | Specialty design services | 7499 |
| | | 87909 | Other business services n.e.c. | 7499 |
| DIVISION 88 | | | AGRICULTURAL, MINING AND MANUFACTURING SERVICES | |
| 881 | | | Services incidental to agriculture, hunting and forestry | |
| | 8811 | 88110 | Services incidental to agriculture | 0140 |
| | 8812 | 88120 | Services incidental to animal husbandry | 0140 |
| | 8813 | 88130 | Services incidental to hunting | 0150 |
| | 8814 | 88140 | Services incidental to forestry and logging | 0200 |
| 882 | 8820 | 88200 | Services incidental to fishing | 0500 |
| 883 | 8830 | 88300 | Services incidental to mining | 1120 |
| 884 | | | Services incidental to manufacturing, except to the manufacture of metal products, machinery and equipment | |
| | 8841 | | Manufacture of food, beverages and tobacco, on a fee or contract basis | |
| | | 88411 | Manufacture of food and beverages, on a fee or contract basis | 15 |
| | | 88412 | Manufacture of tobacco on a fee or contract basis | 16 |
| | 8842 | | Manufacture of textiles, wearing apparel and leather products on a fee or contract basis | |
| | | 88421 | Manufacture of textiles on a fee or contract basis | 17 |
| | | 88422 | Manufacture of wearing apparel on a fee or contract basis | 18 |
| | | 88423 | Manufacture of leather products on a fee or contract basis | 19 |
| | 8843 | 88430 | Manufacture of wood and of products of wood and cork, except furniture; manufacture of articles of straw and plaiting materials, on a fee or contract basis | 20 |
| | 8844 | | Manufacture of paper and paper products; publishing and printing ,on a fee or contract basis | |
| | | 88441 | Manufacture of paper and paper products ,on a fee or contract basis | 21 |

| Group | Class | Subclass | Title | Corresponding ISIC |
|---|---|---|---|---|
| | | 88442 | Publishing and printing ,on a fee or contract basis | 22 |
| | 8845 | 88450 | Manufacture of coke, refined petroleum products and nuclear fuel, on a fee or contract basis | 23 |
| | 8846 | 88460 | Manufacture of chemicals and chemical products, on a fee or contract basis | 24 |
| | 8847 | 88470 | Manufacture of rubber and plastics products, on a fee or contract basis | 25 |
| | 8848 | 88480 | Manufacture of other non-metallic mineral products, on a fee or contract basis | 26 |
| | 8849 | | Manufacture of furniture; manufacture of other articles n.e.c.; recycling, on a fee or contract basis | |
| | | 88491 | Manufacture of furniture on a fee or contract basis | 361 |
| | | 88492 | Manufacture of other articles n.e.c. ,on a fee or contract basis | 369 |
| | | 88493 | Recycling on a fee or contract basis | 37 |
| 885 | | | Services incidental to the manufacture of metal products, machinery and equipment | |
| | 8851 | 88510 | Manufacture of basic metals on a fee or contract basis | 27 |
| | 8852 | 88520 | Manufacture of fabricated metal products, except machinery and equipment, on a fee or contract basis | 28 |
| | 8853 | 88530 | Manufacture of machinery and equipment n.e.c., on a fee or contract basis | 29 |
| | 8854 | 88540 | Manufacture of office, accounting and computing machinery, on a fee or contract basis | 30 |
| | 8855 | 88550 | Manufacture of electrical machinery and apparatus n.e.c., on a fee or contract basis | 31 |
| | 8856 | 88560 | Manufacture of radio, television and communication equipment and apparatus, on a fee or contract basis | 32 |
| | 8857 | 88570 | Manufacture of medical precision and optical instruments, watches and clocks, on a fee or contract basis | 33 |
| | 8858 | 88580 | Manufacture of motor vehicles, trailers and semi-trailers, on a fee or contract basis | 34 |
| | 8859 | 88590 | Manufacture of other transport equipment, on a fee or contract basis | 35 |
| 886 | | | Repair services incidental to metal products, machinery and equipment | |
| | 8861 | 88610 | Repair services of fabricated metal products, except machinery and equipment, on a fee or contract basis | 28 |
| | 8862 | 88620 | Repair services of machinery and equipment n.e.c., on a fee or contract basis | 29 |

| Group | Class | Subclass | Title | Corresponding ISIC |
|---|---|---|---|---|
| | 8863 | 88630 | Repair services n.e.c. of office, accounting and computing machinery, on a fee or contract basis | 30 |
| | 8864 | 88640 | Repair services of electrical machinery and apparatus n.e.c., on a fee or contract basis | 31 |
| | 8865 | 88650 | Repair services of radio, television and communication equipment and apparatus, on a fee or contract basis | 32 |
| | 8866 | 88660 | Repair services of medical, precision and optical instruments, watches and clocks, on a fee or contract basis | 33 |
| | 8867 | 88670 | Repair services n.e.c. of motor vehicles, trailers and semi-trailers, on a fee or contract basis | 34 |
| | 8868 | 88680 | Repair services of other transport equipment, on a fee or contract basis | 35 |
| 887 | 8870 | 88700 | Services incidental to energy distribution | 40 |
| DIVISION 89 | | | INTANGIBLE ASSETS | |
| 891 | 8910 | 89100 | Financial assets and liabilities | 65 |
| 892 | | | Non-financial intangible assets | |
| | 8921 | 89210 | Patents | 7310 |
| | 8922 | 89220 | Trademarks | |
| | 8923 | 89230 | Copyrights | |
| | 8929 | 89290 | Other non-financial intangible assets | |
| SECTION 9 | | | COMMUNITY, SOCIAL AND PERSONAL SERVICES | |
| DIVISION 91 | | | PUBLIC ADMINISTRATION AND OTHER SERVICES TO THE COMMUNITY AS A WHOLE; COMPULSORY SOCIAL SECURITY SERVICES | |
| 911 | | | Administrative services of the government | |
| | 9111 | | Over-all government public services | |
| | | 91111 | Executive and legislative services | 7511 |
| | | 91112 | Financial and fiscal services | 7513 |
| | | 91113 | Over-all economic and social planning and statistical services | 7511 |
| | | 91114 | Government services to fundamental research | 7511 |
| | | 91119 | Other administrative services of the government n.e.c. | 7511 |
| | 9112 | | Administrative services of agencies that provide educational, health care, cultural and other social services excluding social security services | |
| | | 91121 | Administrative educational services | 7512 |

Part Three

## EXPLANATORY NOTES FOR THE SERVICES LISTED IN CPC

* * * * *

87909 Other business services n.e.c.

Services generally provided to businesses, not elsewhere classified. Included here are business brokerage services, appraisal services other than for real estate, secretarial services, demonstration and exhibition services, etc.

### DIVISION 88 AGRICULTURAL, MINING AND MANUFACTURING SERVICES

Services rendered on a fee or contract basis by units mainly engaged in the production of transportable goods, and services typically related to the production of such goods.

A great number and a wide variety of services are classified here which may be classified according to broad industry categories into:

Services incidental to agriculture, hunting, forestry and fishing: services rendered on a fee or contract basis, mostly performed at the site where the agricultural production is done, e.g. services providing agricultural machinery with drivers and crew; harvesting and related services; services of farm labour contractors; animal boarding, care and breeding services; services to promote propagation, growth and output of animals; services to promote commercial hunting and trapping; timber evaluation, firefighting, forest management including forest damage assessment services; logging related

services; services related to fishery and operational services of fish hatcheries or fish farms.

Services incidental to mining: services rendered on a fee or contract basis at oil and gas fields, e.g. drilling services, derrick building, repair and dismantling services, oil and gas well casings cementing services.

Exclusion: Mineral prospecting services, oil and gas field exploration and geophysical (e.g. seismic) and geological surveying services are classified in class 8675 (Engineering related scientific and technical consulting services).

Services incidental to manufacturing: these include manufacturing on a fee or contract basis, i.e. manufacturing services rendered to others where the raw materials processed, treated or finished are not owned by the manufacturer. Assembly, installation other than construction work, fitting of articles, maintenance and repair services are also classified here.

The following are examples of manufacturing services:

- services rendered on a fee or contract basis related to processing and preserving of meat, fish, fruit, vegetables, dairy products and bakery products;
- services rendered on a fee or contract basis related to finishing of textiles and manufacture of made-up textile articles (incl. services concerning some entrepreneurial functions, e.g. designing and preparing samples); services related to tanning and dressing of leather and to manufacture of leather and footwear;
- printing on a fee or contract basis and services related to printing, e.g. bookbinding services;

- casting and forging services of metals treatment and coating services of metals; general mechanical engineering services on a fee or contract basis; repair services incidental to metal products, machinery and equipment.

Exclusions: Installation work for constructions is classified in group 516. Repair services of motor vehicles, motorcycles, and household appliances, equipment, furnishings and other consumer goods are classified in subclasses 61120 and 61220 and in group 633 (Repair services of personal and household goods). Services consisting in merely bottling and labelling liquors, wines and waters are classified in subclass 62226 (Wholesale trade services of beverages), if performed as part of buying and selling at wholesale, and in subclass 87600 (Packaging services), if performed on a fee or contract basis.

Maintenance and repair services of office and computer machinery are classified in subclass 84500.

Services incidental to energy distribution: transmission and distribution services on a fee or contract basis of electricity, gaseous fuels and steam and hot water to household, industrial, commercial and other users.

Exclusion: Transport services via pipeline on a fee or contract basis of petroleum and natural gas are classified in subclass 71310.

DIVISION 89 INTANGIBLE ASSETS

891 Financial assets and liabilities

8910 89100 Financial assets and liabilities

Gold and IMF special drawing rights. Currency in circulation and transferable deposits. Other

claims on monetary institutions, other financial institutions and government organs that are represented by evidence of deposit. Short-term or long-term loans not elsewhere classified. Net equity of households on life insurance reserves and on pension funds. Proprietors' net equity in enterprises. Trade credit and advances. Other financial assets and liabilities.

892 Non-financial intangible assets

892 89210 Patents

Royalties for the right to use patents, i.e. periodic fees in respect of licences for inventions (novel ideas) concerning the manufacture of patented goods, or the use of patented processes. A patent may be defined as a document, issued by a government office, that describes the invention and creates a legal situation in which the patented invention can normally only be exploited with the authorization of the patentee. This protection is limited in time.

* * * * *

**MULTILATERAL TRADE NEGOTIATIONS**
**THE URUGUAY ROUND**

RESTRICTED
MTN.GNS/W/120
10 July 1991
Special Distribution

**Group of Negotiations on Services**

# SERVICES SECTORAL CLASSIFICATION LIST

## Note by the Secretariat

The secretariat indicated in its informal note containing the draft classification list (24 May 1991) that it would prepare a revised version based on comments from participants. The attached list incorporates, to the extent possible, such comments. It could, of course, be subject to further modification in the light of developments in the services negotiations and ongoing work elsewhere.

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GATT SECRETARIAT
UR-91-0074

## SERVICES SECTORAL CLASSIFICATION LIST

| SECTORS AND SUB-SECTORS | CORRESPONDING CPC |
|---|---|
| 1. BUSINESS SERVICES | Section B |
| A. Professional Services | |
| a. Legal Services | 861 |
| b. Accounting, auditing and bookeeping services | 862 |
| c. Taxation Services | 863 |
| d. Architectural services | 8671 |
| e. Engineering services | 8672 |
| f. Integrated engineering services | 8673 |
| g. Urban planning and landscape architectural services | 8674 |
| h. Medical and dental services | 9312 |
| i. Veterinary services | 932 |
| j. Services provided by midwives, nurses, physiotherapists and para-medical personnel | 93191 |
| k. Other | |
| B. Computer and Related Services | |
| a. Consultancy services related to the installation of computer hardware | 841 |
| b. Software implementation services | 842 |
| c. Data processing services | 843 |
| d. Data base services | 844 |
| e. Other | 845+849 |
| C. Research and Development Services | |
| a. R&D services on natural sciences | 851 |
| b. R&D services on social sciences and humanities | 852 |

| | |
|---|---|
| c. Interdisciplinary R&D services | 853 |
| D. Real Estate Services | |
| a. Involving own or leased property | 821 |
| b. On a fee or contract basis | 822 |
| E. Rental/Leasing Services without Operators | |
| a. Relating to ships | 83103 |
| b. Relating to aircraft | 83104 |
| c. Relating to other transport equipment | 83101+ 83102+83105 |
| d. Relating to other machinery and equipment | 83106-83109 |
| e. Other | 832 |
| F. Other Business Services | |
| a. Advertising services | 871 |
| b. Market research and public opinion polling services | 864 |
| c. Management consulting service | 865 |
| d. Services related to man. consulting | 866 |
| e. Technical testing and analysis serv. | 8676 |
| f. Services incidental to agriculture, hunting and forestry | 881 |
| g. Services incidental to fishing | 882 |
| h. Services incidental to mining | 883+5115 |
| i. Services incidental to manufacturing (except for 88442) | 884+885 |
| j. Services incidental to energy distribution | 887 |
| k. Placement and supply services of Personnel | 872 |
| l. Investigation and security | 873 |
| m. Related scientific and technical consulting services | 8675 |

| | |
|---|---|
| n. Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment) | 633+ 8861-8866 |
| o. Building-cleaning services | 874 |
| p. Photographic services | 875 |
| q. Packaging services | 876 |
| r. Printing, publishing | 88442 |
| s. Convention services | 87909* |
| t. Other | 8790 |
| 2. COMMUNICATION SERVICES | |
| A. Postal services | 7511 |
| B. Courier services | 7512 |
| C. Telecommunication services | |
| a. Voice telephone services | 7521 |
| b. Packet-switched data transmission services | 7523** |
| c. Circuit-switched data transmission transmission services | 7523** |
| d. Telex services | 7523** |
| e. Telegraph services | 7522 |
| f. Facsimile services | 7521**+7529** |
| g. Private leased circuit services | 7522**+7523** |
| h. Electronic mail | 7523** |
| i. Voice mail | 7523** |

* The (*) indicates that the service specified is a component of a more aggregated CPC item specified elsewhere in this classification list.

** The (**) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (e.g. voice mail is only a component of CPC item 7523).

| | |
|---|---|
| j. On-line information and data base retrieval | 7523** |
| k. electronic data interchange (EDI) | 7523** |
| l. enhanced/value-added facsimile services, incl. store and forward, store and retrieve | 7523** |
| m. code and protocol conversion | n.a. |
| n. on-line information and/or data processing (incl. transaction processing) | 843** |
| o. other | |
| D. Audiovisual services | |
| a. Motion picture and video tape production and distribution services | 9611 |
| b. Motion picture projection service | 9612 |
| c. Radio and television services | 9613 |
| d. Radio and television transmission services | 7524 |
| e. Sound recording | n.a. |
| f. Other | |
| E. Other | |
| 3. CONSTRUCTION AND RELATED ENGINEERING SERVICES | |
| A. General construction work for buildings | 512 |
| B. General construction work for civil engineering | 513 |
| C. Installation and assembly work | 514+516 |
| D. Building completion and finishing work | 517 |
| E. Other | 511+515+518 |
| 4. DISTRIBUTION SERVICES | |

| | |
|---|---|
| A. Commission agents' services | 621 |
| B. Wholesale trade services | 622 |
| C. Retailing services | 631+632<br>6111+6113+6121 |
| D. Franchising | 8929 |
| E. Other | |
| 5. EDUCATIONAL SERVICES | |
| A. Primary education services | 921 |
| B. Secondary education services | 922 |
| C. Higher education services | 923 |
| D. Adult education | 924 |
| E. Other education services | 929 |
| 6. ENVIRONMENTAL SERVICES | |
| A. Sewage services | 9401 |
| B. Refuse disposal services | 9402 |
| C. Sanitation and similar services | 9403 |
| D. Other | |
| 7. FINANCIAL SERVICES | |
| A. All insurance and insurance-related services | 812** |
| a. Life, accident and health insurance services | 8121 |
| b. Non-life insurance services | 8129 |
| c. Reinsurance and retrocession | 81299* |
| d. Services auxiliary to insurance (including broking and agency services) | 8140 |

| | |
|---|---|
| B. Banking and other financial services (excl. insurance) | |
| a. Acceptance of deposits and other repayable funds from the public | 8115-81119 |
| b. Lending of all types, incl., inter alia, consumer credit, mortgage credit, factoring and financing of commercial transaction | 8113 |
| c. Financial leasing | 8112 |
| d. All payment and money transmission services | 81339** |
| e. Guarantees and commitments | 81199** |
| f. Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following: | |
| - money market instruments (cheques, bills, certificate of deposits, etc.) | 81339** |
| - foreign exchange | 81333 |
| - derivative products incl., but not limited to, futures and options | 81339** |
| - exchange rate and interest rate instruments, inclu. products such as swaps, forward rate agreements, etc. | 81339** |
| - transferable securities | 81321* |
| - other negotiable instruments and financial assets, incl. bullion | 81339** |

| | |
|---|---|
| g. Participation in issues of all kinds of securities, incl. under-writing and placement as agent (whether publicly or privately) and provision of service related to such issues | 8132 |
| h Money broking | 81339** |
| i. Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial depository and trust services | 8119+** 81323* |
| j. Settlement and clearing services for financial assets, incl. securities derivative products, and other negotiable instruments | 81339** or 81319** |
| k. Advisory and other auxiliary financial services on all the activities activities listed in or Article 1B of MTN.TNC/W/50, incl. credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy | 8131 or 8133 |
| l. Provision and transfer of financial information, and financial data processing and related software by providers of other financial services | 8131 |

C. Other

8. HEALTH RELATED AND SOCIAL SERVICES (other than those listed under 1.A.h-j.)

| | |
|---|---|
| A. Hospital services | 9311 |
| B. Other Human Health Services (other than 93191) | 9319 |
| C. Social Services | 933 |
| D. Other | |

9. TOURISM AND TRAVEL RELATED SERVICES

| | |
|---|---|
| A. Hotels and restaurants (incl. catering) | 641-643 |
| B. Travel agencies and tour operators services | 7471 |
| C. Tourist guides services | 7472 |
| D. Other | |

10. RECREATIONAL, CULTURAL AND SPORTING SERVICES (other than audiovisual services)

| | |
|---|---|
| A. Entertainment services (including theatre, live bands and circus services) | 9619 |
| B. News agency services | 962 |
| C. Libraries, archives, museums and other cultural services | 963 |
| D. Sporting and other recreational services | 964 |
| E. Other | |

11. TRANSPORT SERVICES

| | |
|---|---|
| A. Maritime Transport Services | |
| a. Passenger transportation | 7211 |
| b. Freight transportation | 7212 |
| c. Rental of vessels with crew | 7213 |
| d. Maintenance and repair of vessels | 8868** |
| e. Pushing and towing services | 7214 |
| f. Supporting services for maritime transport | 745** |
| B. Internal Waterways Transport | |
| a. Passenger transportation | 7221 |
| b. Freight transportation | 7222 |
| c. Rental of vessels with crew | 7223 |
| d. Maintenance and repair of vessels | 8868** |
| e. Pushing and towing services | 7224 |
| f. Supporting services for internal waterway transport | 745** |
| C. Air Transport Services | |
| a. Passenger transportation | 731 |
| b. Freight transportation | 732 |
| c. Rental of aircraft with crew | 734 |
| d. Maintenance and repair of aircraft | 8868** |
| e. Supporting services for air transport | 746 |
| D. Space Transport | 733 |
| E. Rail Transport Services | |
| a. Passenger transportation | 7111 |
| b. Freight transportation | 7112 |
| c. Pushing and towing services | 7113 |
| d. Maintenance and repair of rail transport equipment | 8868** |
| e. Supporting services for rail transport services | 743 |

| | |
|---|---|
| F. Road Transport Services | |
| a. Passenger transportation | 7121+7122 |
| b. Freight transportation | 7123 |
| c. Rental of commercial vehicles with operator | 7124 |
| d. Maintenance and repair of road transport equipment | 6112+8867 |
| e. Supporting services for road transport services | 744 |
| G. Pipeline Transport | |
| a. Transportation of fuels | 7131 |
| b. Transportation of other goods | 7139 |
| H. Services auxiliary to all modes of transport | |
| a. Cargo-handling services | 741 |
| b. Storage and warehouse services | 742 |
| c. Freight transport agency services | 748 |
| d. Other | 749 |
| I. Other Transport Services | |
| 12. OTHER SERVICES NOT INCLUDED ELSEWHERE | 95+97+98+99 |

WORLD TRADE ORGANIZATION

S/CSS/W/24
18 December 2000

(00-5556)

Council for Trade in Services
Special Session

Original: English

## COMMUNICATION FROM THE UNITED STATES

Energy Services

The attached communication has been received from the delegation of the United States with the request that it be circulated to Members of the Council for Trade in Services.

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### I. ENERGY SERVICES AND TRADE NEGOTIATIONS: BACKGROUND

1. The United States presents this proposal on negotiation of energy services for consideration by all Members. It is intended to stimulate discussion of this important sector in the world economy.

#### A. CLASSIFICATION OF ENERGY SERVICES

2. Energy services are those services involved in the exploration, development, extraction, production, generation, transportation, transmission, distribution, marketing, consumption, management, and efficiency of energy, energy products, and fuels.

#### B. IMPORTANCE OF ENERGY SERVICES

3. Competitive provision of energy services helps ensure that energy consumers have access to efficiently produced, market-priced, reliable energy. The availability of varied sources of energy at competitive prices, including access to supplies transmitted cross-border, contributes to a nation's ability to compete in the world marketplace. Competitive conditions in a nation's energy services markets enhance the competitiveness of domestic energy consumers as well as incentives for foreign investors to invest in both energy services and energy-consuming sectors. They also can benefit residential consumers and social services, as well as employment, through the beneficial impact on energy-dependent services and manufacturing sectors.

C. ENERGY SERVICES IN THE URUGUAY ROUND

4. Previous trade negotiations resulted in relatively few commitments for energy services for several, interrelated reasons:

- At the time of the Uruguay Round, much of the energy industry was characterized by state- owned enterprises operating mostly within home markets as vertically integrated companies with monopoly positions. Most service functions were performed "in- house" by energy companies that controlled the whole production and distribution chain.
- Because most energy services were conducted "in house" by the integrated, or monopoly, energy provider, W/120, which many Members used as a guide for scheduling their Uruguay Round commitments, contained no separate division for energy services. Notwithstanding this, in many cases energy ser-

vices appear to be included in the general categories of W/120.

- Services negotiators in the Uruguay Round focused primarily on sectors where discrete services were readily identifiable, trade was already significant, business interest in trade liberalization was strong, and consumer benefits were apparent, and so paid little attention to the energy services sector. Changing market conditions have, to a great extent, created a new paradigm for energy services in trade negotiations such that a focus on liberalization in this sector is now appropriate.

D. LEGITIMATE AND CONTINUING ROLE FOR REGULATION OF RESOURCES

5. The U.S. market offers access to service suppliers for a number of energy services. At the same time, we regulate, and will continue to regulate, these and related sectors in the public interest, at the national and subnational levels.

6. For instance, we maintain a number of regulations intended to ensure that energy resources are developed in a manner appropriate for addressing the challenges that this sector faces and consistent with objectives such as environmental protection, conservation of natural resources, and sustainable development. These include regulations requiring the use of technology in order to achieve environmental or conservation goals, or requiring the reporting and disclosure of information regarding environmental effects of sectoral activities.

E. MEASURES RESTRICTING THE PROVISION OF ENERGY SERVICES IN FOREIGN MARKETS

7. In their foreign operations, energy services providers face a variety of barriers that fall within two key categories—limits on market access and national treatment, and restrictive or discriminatory regulations.

- Market access and national treatment restrictions are similar to those faced by many services providers and include lack of a right of establishment, an inability to provide cross-border service, and discriminatory treatment between foreign and domestic service providers, among others.

- Regulatory frameworks can often be opaque, discriminatory, and arbitrary. Without a regulatory network that provides a basis for fair competition, energy services companies are often at a disadvantage to a favoured competitor, as in the case of procurement practices. As in the case of basic telecommunications and financial services, market access and national treatment commitments, while necessary, may not be sufficient to assure liberalization for energy services.

- Energy service providers often face barriers to entering needed personnel and equipment.

- Both market access, national treatment, and regulatory issues must therefore be addressed in the services negotiations. Market access and national treatment commitments may well be meaningless without regulatory reform. At the same time, it does little good for trade liberalization as a practical matter to create a pro-competitive regulatory envi-

ronment unless market access and national treatment restrictions are eliminated.

## II. Negotiating Objectives: A Proposal for Energy Services

### Introduction: GATS Market Access and National Treatment Disciplines

8. GATS market access and national treatment disciplines are relevant to the energy services sector, just like any other service sector.

- Our interests lie in areas of energy services that are open to private participation. In these areas, we seek commitments to market access, national treatment, and regulatory disciplines that allow competitive access by foreign and domestic service suppliers alike, while maintaining governmental abilities to address non-trade public policy goals as noted above.

- We realize that many countries are in different phases of regulatory development and that, as a result, competition for energy services varies significantly from one country to another. In this context, we understand that varying levels of competition may result in differences as members undertake their commitments in this sector.

Ownership of public resources

9. In a large number of countries, including our own, many natural resources are held in trust for the public. The United States recognizes this, and is not proposing to address issues of ownership of natural resources.

**A. Address classification of energy services**

10. The Index of energy activities would incorporate all energy services and energy-related service activities provided for within W/120, as well as those energy activities identified as not falling within the GATS. This discussion is ongoing in the Committee on Specific Commitments.

11. Many energy services are classified in W/120 under "Business" services (Division I), which typically includes such unregulated activities as computer and related services and management consulting services.

B. **Negotiate the broadest possible market access and national treatment commitments** for the services subcategories included in the Index of Energy Activities, consistent with the public interest objectives discussed above.

12. Energy services providers should have the opportunity to provide and distribute their services on a non-discriminatory basis through all four modes provided under the GATS.

13. Commitments for energy services should also incorporate a variety of principles aimed at ensuring the greatest possible market opening for energy services, including:

- Technological neutrality. Technology in energy services continues to evolve at a rapid pace. To ensure that energy services providers can use the best available technology, such as in site preparation and development, market access commitments should be made without regard for the technology used to provide energy services, except as noted above.

- Temporary entry of equipment/tools of the trade. Energy services providers often rely on specialized equipment to perform their service. Should negotiations on goods commence, we would strongly urge governments to consider eliminating tariffs on energy related goods. While not fully resolving the issues surrounding the need to temporarily enter equipment and tools of the trade, such an initiative could significantly help facilitate such activities and would enhance greatly the costs savings and benefits associated with energy services liberalization. We also urge consideration of other means to ensure that energy services providers can enter equipment and tools of the trade that are necessary to provide a service on which a market access commitment is made.

- Temporary entry of business persons and specialists. Energy services companies employ many people with highly specialized skills and should have the right to the temporary entry of essential personnel necessary to provide a covered service.

- Unrestricted movement of electronic information and transactions. Many energy services today rely on electronic information flows and transactions, including geologic data analysis, trading and brokering, and energy efficiency services. Any negotiation should ensure the free movement of these information exchanges and transactions.

C. CONSIDER A REFERENCE PAPER

14. Regulations and technical requirements may create significant impediments to market entry and competition. At the same time, however, regulation of the en-

ergy sector is essential to the achievement of public interest goals as discussed above, including the assurance of an open, competitive energy services market.

15. In the negotiations on basic telecommunications, WTO Members recognized the need for specific additional commitments related to a highly regulated sector that was undergoing deregulation and often was characterized by large incumbent suppliers.

16. All of the foregoing considerations pertain to energy services. With these considerations in mind, a similar paper on energy services might be developed that would address, for instance:

- Transparency in the formulation, promulgation and implementation of rules, regulations, and technical standards.
- Non-discriminatory third-party access to and interconnection with energy networks and grids, where they are dominated by government entities or dominant suppliers.
- An independent regulatory system separate from and not accountable to any supplier of energy services.
- Nondiscriminatory, objective and timely procedures for the transportation and transmission of energy.
- Requirements that parties maintain appropriate measures for the purpose of preventing certain anticompetitive practices in these sectors.

## Annex A

### Index for Classification of Energy Services

**Draft - For Discussion Purposes Only**

The purpose of this index is to identify W/120 and corresponding Provisional CPC categories that contain energy services. This exercise does not prejudge the questions of whether all possible energy service activities are listed or which of these activities fall within the scope of the GATS.

Reference to energy source (e.g., oil, natural gas, hydroelectric, geothermal, solar, wind, tidal, wave energy, and coal) in this Index is technology neutral unless otherwise specified.

| W/120 Classification | | Prov. CPC Numbers | Provisional CPC Heading |
|---|---|---|---|
| 1.A. | Professional Services | 8612, 8619 | Legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc.; and Other legal advisory and information services. |
| | | 8671 | Architectural services |
| | | 8672 | Engineering services |

| | | | |
|---|---|---|---|
| | | 8673 | Integrated engineering services |
| 1.B. | Computer and Related Services | 84 | Computer and Related Services |
| 1.C | Research and Development Services | 851 | Research and experimental development services on natural sciences and engineering |
| 1.E. | Rental and Leasing Services, without Operator | 83107, 83109 | Rental and leasing services without operators relating to construction machinery and equipment or other machinery and equipment, without operator (note: rental of equipment *with* operator is classified under construction services, CPC 518). |
| I.F. | Other Business Services | 865 | Management consulting services |
| | | 866 | Services related to management consulting |
| | | 8676 | Technical testing and analysis services |

| | | |
|---|---|---|
| | 883 | Services incidental to mining |
| | 884, 885 | Services incidental to manufacturing |
| | 887 | Services incidental to energy distribution |
| | 8675 | Related scientific and technical consulting services |
| | 886 | Maintenance and repair of equipment |
| | 8790 | Other Business Services |
| 3. Construction and Related Engineering Services | 511 | Pre-erection work at construction sites |
| | 512 | Construction work for buildings |
| | 513 | Construction work for civil engineering |
| | 515 | Special trade construction work |
| | 516 | Installation work |
| | 518 | Renting services related to equipment for construction or demolition of buildings or civil engineering works, with operator |
| 4. Distribution Services | 621 | Commission agents' services |

| | | | |
|---|---|---|---|
| | | 622 | Wholesale trade services |
| | | 632 | Non-food retailing services |
| | | 6111, 6113, 6121 | Sales of motor vehicles, motorcycles and snowmobiles, and related parts and accessories |
| | | 613[1] | Retail sales of motor fuel |
| 5. | Educational Services | 924, 929 | Adult education and other education services |
| 6. | Environmental Services[2] | 940 | Sewage and refuse disposal, sanitation and other environmental protection services |
| 7.B. | Financial Services[2] | 8112 | Financial leasing services |
| | | 8113 | Other credit granting services |
| | | 81199 | Intermediation services not elsewhere classified |
| | | 8132 | Services related to securities markets |

[1] CPC 613, retail sales of motor fuel, was omitted from W/120.

[2] The relationship between environmental and financial services and energy activities is still under discussion.

| | | | |
|---|---|---|---|
| | | 81339 | Other services auxiliary to financial intermediation not elsewhere classified |
| 11. | Transportation Services including | 7112 | Freight transportation by railway |
| | | 7123 | Freight transportation by road |
| | | 713 | Transport services via pipeline |

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Inv. Nos. A-427-818, C-427-819-412-820, C-412-821, A-428-828, C-428-829, A-421-808 & C-421-809

**PUBLIC DOCUMENT**

April 11, 2001

**VIA HAND DELIVERY**
The Honorable Donald L. Evans
Secretary of Commerce
Attn: Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Antidumping and Countervailing Duty Investigations: Low Enriched Uranium From France, Germany, the Netherlands and the United Kingdom: Scope of Investigation and Questionnaires; Response to April 5, 2001 Letter of the Ad Hoc Utilities Group

Dear Secretary Evans:

This letter is filed on behalf of USEC Inc., and its wholly owned subsidiary United States Enrichment Corporation, petitioners in the above-captioned investigations (collectively "USEC" or "Petitioner"), in response to the letter of April 5, 2001, submitted by Shaw Pittman on behalf of the Ad Hoc Utilities Group * * *

ST/ESA/STAT/SER.M/77NER.1.0

**DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS STATISTICS DIVISION**

STATISTICAL PAPERS SERIES M No.77, Ver. 1.0

# Central Product Classification (Cpc)

## Version 1.0

[Seal Omitted] UNITED NATIONS ● NEW YORK, 1998

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Explanatory notes

22. Explanatory notes are provided for sections 5 to 9 of CPC Version 1.0. In the revision process, the description of the content of many subclasses was clarified and improved. Furthermore, the notes have been changed from descriptive text into lists of products providing illustrative examples of what is included and what is not included in a certain CPC code. As these lists are not exhaustive, users may wish to request guidance from the United Nations Statistics Division on interpreting the content of CPC subclasses. The problems that are referred to the Statistics Division will provide the basis for the expansion and refinement of the explanatory notes in future revisions. Users of CPC version 1.0 should be aware that the classification and its explanatory notes were developed solely for statistical purposes. Therefore, if reference is made to this classification in a legal text, such as a contract, those who prepared the text are responsible for interpreting and explaining their use of the classification.

Future work

23. As with any product classification, particularly in the early years of its development, CPC will need to be revised at relatively frequent intervals as future experience is gained with its use. It is expected that the detail of the goods part of the classification will be further examined and that the higher level structure of the whole classification will be further reviewed. It should be possible to produce a reference list of goods for transportation, as has been done for wholesale and retail trade. It is also hoped that in the next few years, after countries

have undertaken further work, it will be possible to develop the classification in greater detail for financial intermediation services and telecommunication services. The are of public administration will be revised in the light of ongoing revisions to the United Nations Classification of the Functions of Government (COFOG).[7]

* * * * *

[7] *Classification of the Functions of Government*, Statistical Papers, Series M, No. 70 (United Nations publication. Sales No. E.80.XVII.17).

**[FOR PUBLIC FILE]**

[Logo Omitted]

**UNITED STATES DEPARTMENT OF COMMERCE**
**International Trade Administration**
Washington, D.C. 20230

[5/7/01]

A-427-818, A-428-828,
A-421-808, A-412-820,
C-427-819, C-428-829,
C-421-809, C-412-821
POI: 10/1/99 - 9/30/00;
1/1/99 - 12/31/99

**PUBLIC DOCUMENT**
DAS II/VI

MEMORANDUM TO: Bernard Carreau [BTC 5/7/01]
DAS Group II
AD/CVD Enforcement

THROUGH: Melissa Skinner [MS 5/7/01]
Office Director
Group II, Office VI
AD/CVD Enforcement

FROM: The Uranium Team

SUBJECT: Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom; Comments on the Scope of the Investigations

DATE: May 7, 2001

Background

As stated in our January 5, 2001, notices of initiation, we set aside a period for interested parties to raise issues regarding product coverage in these cases.[1] Since our initiation, we have received numerous comments regarding the scope of these investigations.

On January 17, 2001, the Department of Commerce (the Department) received comments regarding the scope of the investigations from Cogema, and Eurodif, respondents in the French antidumping and countervailing duty investigations, and the Urenco consortium, respondents in the German, Dutch, and British antidumping and countervailing duty investigations (collectively, the respondents) and the United States Enrichment Corporation (USEC), the petitioners. On January 23, 2001, petitioners filed comments regarding respondents' comments on the scope. In addition, on April 5, 2001, the Ad Hoc Utilities Group (Utilities Group)[2] submitted comments in response to submissions by the petitioners commenting on the scope of the Department's investigation and the content of the Department's questionnaire to the respondents. On April 11, 2001, the petitioners submitted comments addressing the issues raised in a

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[1] *Notice of Initiation of Antidumping Duty Investigations: Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom*, 66 FR 1080, 1081 (Jan. 5, 2001); *Notice of Initiation of Countervailing Duty Investigations: Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom*, 66 FR 1085, 1086 (Jan. 5, 2001).

[2] In accordance with 777(h) of the Act, the administering authority provides the opportunity for industrial users (like the Utilities Group) to provide comment.

letter from the Utilities Group. Finally, on May 3, 2001, the Utilities Group submitted additional comments.

Interested Party Comments

Respondents argue that the enrichment contracts under investigation cover purchases of enrichment services, not the sales of goods. Respondents also note that the applicable antidumping law is structured to compare sales of subject merchandise (*i.e.*, goods) in the foreign country market with sales of subject merchandise in the United States. They then note that while the subject merchandise is low enriched uranium (LEU), virtually all contracts with utilities are structured as contracts for enrichments services. In support of their argument, they state that standard enrichment contracts are entitled "Enrichment Services Contracts," which cover the supply of uranium enrichment services. To illustrate this point further, the respondents note that the utilities purchase and arrange for the conversion of the uranium, ship the uranium to the respondents for enrichment services, and then arrange for further processing of the LEU, all without forfeiting ownership rights to the uranium. In other words, they add, title to the LEU for the transactions in question remains at all times with the utility and does not pass to the enrichers. Respondents also cite, as evidence that utilities are contracting for services, the fact that payment for most enrichment contracts is based on separative work units (SWU), not LEU. To further support their assertions, respondents cite to a case from the U.S. Court of Federal Claims, in which the U.S. government, on behalf of USEC, stated, and the court agreed, that the enrichment provided by the petitioners to their customers was in fact a service, not a good, as well as USEC submissions in the suspen-

ded antidumping investigation on uranium from Kazakhstan.[3]

Respondents also cite to the Department's final determination in *Forged Undercarriage Components from Italy*,[4] and analogize enrichers of uranium to forgers of steel. They note that the Department concluded in that determination that because title to the raw materials for the forging of steel did not pass to the forger, and because the forger merely returned the semi-finished products to the suppliers of the raw material and charged only for forging services, these services could not be considered as sales of merchandise. Like the forgers, respondents argue, the utilities are merely providing uranium to the enricher and then purchasing enrichment services from these enrichers. As they explain, the output of their activity is not a tangible good; rather, the output is enrichment, measured and sold in intangible SWU.

Respondents conclude that it logically follows that enrichers are providing enrichment services, not sales of merchandise; thus, the Department does not have the statutory authority to include these types of sales of enrichment within the scope of these investigations.

In contrast, the petitioners argue that the Department should include within its investigation all sales

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[3] *See Barseback Kraft AB v. U.S.*, 36 Fed. Cl. 691, 705 (1996). Respondents also cite to, Letter from R. Kingdon to William Daley in *Uranium from Kazakhstan*, (December 8, 1997), where they claim that USEC acknowledged that enrichment of uranium is a service for purposes of U.S. trade law.

[4] *Forged Undercarriage Components From Italy: Final Determination of Sales at Not Less Than Fair Value*, 49 FR 7137 (1984), (*Forged Undercarriage Components*).

made by enrichers to utility companies because all transactions involve the sale of merchandise. Moreover, petitioners argue that they are clearly producers of tangible goods. They cite several reasons in support of their argument. First, petitioners state that the production activities of enrichers represent the final stage of production of LEU. This final stage, they add, accounts for approximately 60 percent of the value of the LEU, which confers country of origin on the imported merchandise. Second, petitioners argue that the enrichers produce LEU from a fungible feedstock of uranium and do not deliver back to the utility the enriched form of the specific converted uranium delivered by the utility. Therefore, they maintain that, at the time the utility receives the LEU from the enricher, the enricher takes title to the converted uranium that was delivered by the utility to the enricher (*i.e.*, enrichers generally do not use the same uranium supplied by the utility to produce the LEU they ship to that utility.) Third, the petitioners point out that the enrichers can deliver the requisite amount of LEU to the utility customer regardless of whether the enricher produced or purchased the LEU (*i.e.*, enrichers can meet their contractual delivery requirements from any source, including enrichers' own purchases of LEU from other sources, and are not required to use the uranium supplied by the utility) which they argue, thwarts respondents' claim that utilities maintain title to the uranium throughout the whole enrichment process. Fourth, petitioners state that there is no difference between LEU that is imported into the United States pursuant to a contract for consideration to be paid in all cash, and a contract for cash and uranium feedstock, because the same enrichment process underlies both transactions; furthermore, it is the en-

richer's ultimate obligation to provide the requisite LEU to the utility regardless of how it is produced and paid for. Fifth, petitioners contend that enrichers may produce LEU for a particular utility customer even before that customer has delivered the requisite amount of uranium agreed upon under its contract, which provides further support for the argument that utilities do not maintain ownership and control over the uranium. Six, petitioners argue that in the *Uranium from Kazakhstan* proceeding, USEC has taken the same position as it has in the instant proceeding, *i.e.*, that enrichers sell LEU, negating respondents claim that petitioners perform a "value-added service." Moreover, petitioners assert that USEC's quote was taken out of context, and the position that USEC took in that proceeding is not inconsistent with the position taken by USEC in this proceeding.[5]

Finally, with regard to respondents' citation of language found in *Forged Undercarriage Components*, petitioners discredit respondents' assertion that the Department maintains that tolling activities are "services" beyond the scope of an investigation. First, they state that the Department reached a contrary conclusion in a subsequent case, which concluded that tolled sales were proper to include within the scope of an investigation.[6] Second, petitioners note that a key aspect of Department conclusion in *Forged Undercarriage Components*, was that title to the materials supplied by the customer never passed to the forger. Furthermore, they stated that the forger simply returned semi-finished products

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[5] Petitioners cite to another filing in the same proceeding where they articulated the position that enrichers sell LEU.

[6] *See Final Determination of Sales at Less than Fair Value: Brass Sheet and Strip from Canada*, 51 FR 44319, 44320 (December 9, 2001).

to the customer after having provided forging services. However, petitioners conclude that in the instant case, in contrast to *Forged Undercarriage Components*, title to the uranium supplied by the utilities ultimately passes to the enricher upon the delivery of the LEU to the customer.

Industrial User Comments

In an April 5, 2001 letter, the Utilities Group attempts to counter many of the arguments petitioner made regarding the scope of the investigation, specifically arguing that sales of LEU should be treated as purchases of enrichment services. The Utilities Group argues that the Department must only compare sales of subject merchandise, not services.

The Utilities Group first notes that the applicable antidumping law is structured to compare sales of subject merchandise (*i.e.*, goods) in the foreign country market with sales of subject merchandise in the United States. They then note that, while the subject merchandise is LEU, virtually all contracts with utilities are structured as contracts for enrichments services. As evidence that they are contracting for services, the Utilities Group cites the titles of the contracts, the fact that payment is based on SWU, and the fact that the utilities: 1) supply the uranium; 2) retain title through the enrichment process; and 3) can specify that the uranium used to make the LEU be of a certain country of origin.

Additionally, the Utilities Group argues that enrichment is internationally recognized as the purchase of a service. They also argue that in the context of GATS negotiations the U.S. government has recognized that enrichment is a service. Respondents state that in the United Nations Central Product Classification (CPC)

system, contracts for enrichment would be classified as contracts for manufacturing services, or services rendered on a fee or contract basis by units mainly engaged in the production of transportable goods, and services typically related to the production of such goods. The Utilities Group also states that the CPC has been adopted by the WTO to identify service sectors for the GATS. They further note that, under the definition of services in the energy sector in a recent U.S. government communication to the WTO, enrichment would be considered a service. The Utilities Group argues that, if the Department were to determine that enrichment contracts covered the sale of goods, the Department would be taking a view contrary to the position of the U.S. government in the GATS context.

In an April 11, 2001 letter, the petitioners address several of the points raised by the Utilities Group in its April 5, 2001 letter regarding scope. Petitioners first comment on the Utilities Group's point that enrichment contracts cover the purchase of services rather than the sale of goods. Petitioners point out that no matter how a particular process may be viewed in other contexts, what is germane to this discussion is how the enrichment process is viewed under the trade law. They note that in 19 U.S.C. § 2114b(5) (part of the 1984 International Trade and Investment Act), services are defined as "economic activities whose outputs are other than tangible goods."[7] They further argue that the intent of the law was to ensure that production of tangible goods, and the trade thereof, would not be removed from the protection of the trade laws applicable to goods. They fur-

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[7] Title III of the Trade and Tariff Act of 1984, Pub. L. No. 98-573 § 306(a)(5) (Oct. 30, 1984).

ther note that under the trade law, there is no meaningful distinction between LEU that is imported into the United States pursuant to contracts where the consideration paid for the LEU is all in cash or pursuant to a contract where the consideration consists of cash or uranium feedstock, because the same enrichment process underlies both transactions. To do otherwise, they argue, would be contrary to the applicable law and the plain language of 19 U.S.C. § 2114b(5).

Petitioners further note that the UN CPC system cited by the Utilities Group is irrelevant to determining whether enrichers provide a service or sell a good under the applicable trade laws. They note that the CPC itself states that it was designed merely for statistical purposes. On April 27, 2001, petitioners submitted comments on the CVD Preliminary Determination, and also addressed the issue of the scope of the investigation relating to certain comments made by respondents. Petitioners contends that respondents plainly produce merchandise, because it plainly produces LEU.

In a May 3, 2001, the Utilities Group responded to the petitioners' arguments laid out in their April 11 and April 27 letters. In this letter, the Utilities Group argues that the definition of services in 19 U.S.C. § 2114b does not authorize the application of the antidumping and countervailing duty laws to trade in enrichment services, and that the nature of enrichers' production activities and the fungibility of uranium feed do not change the character of the sales transactions at issue. The Utilities Group argues that the definition of services stated in section 2114b(5) is specifically limited to only that section. They further argue that the section is limited to establishing a trade development program for

service industries, and is not related to administering the antidumping or countervailing duty laws. The Utilities Group notes that USEC argues that enrichment is not a service because it results in a tangible good. They add, however, that some of the services included in the illustrative list of services provided in the statute, such as construction, design or engineering, also result in tangible goods, but are still categorized as a service.

Department Position:

Respondents do not dispute that LEU is a good subject to the AD/CVD law where the transaction involves the enrichment of feedstock owned by the enrichment company. Instead, respondents argue only certain LEU entering the United States should be treated as non-subject merchandise because in those transactions respondents only provide enrichment "services," and therefore the merchandise should not be considered a "good" within the purview of the AD/CVD law. We disagree.

First, respondents raise the issue of whether certain LEU is subject to the AD/CVD law in the context of the Department's scope determination. However, the Department determines whether specific merchandise is subject to an investigation based upon the written description in the petition. If the petition is ambiguous or defines the product too broadly or narrowly, the Department may reconsider the parameters of the investigation. *See e.g., Initiation of Antidumping and Countervailing Duty Investigations: Butter Cookies in Tins from Denmark*, 63 Fed. Reg. 10822, 10823 (Mar. 5, 1998). Section 771(25) of the Tariff Act defines subject merchandise as "the class or kind of merchandise that is within the scope of an investigation, a review, a suspen-

sion agreement, an order under this subtitle or section 1303 of this title, or a finding under the Antidumping Act, 1921." 19 U.S.C. § 1677(25). In cases in which it is unclear or ambiguous as to whether specific merchandise is within the class or kind of merchandise, the Department employs a five-factor analysis to make its determination, known as "Diversified Criteria." *See* 19 C.F.R. 353.225(k)(2). The primary factor in the Department's analysis is the physical characteristics of the product; other factors include the expectations of the ultimate purchasers; the ultimate use of the product; the channels of trade in which the product is sold; and the manner in which the product is advertised and displayed.

No party in these investigations has argued that LEU has different physical characteristics based upon how the sale is structured. To the contrary, the physical characteristics of all LEU is essentially the same. In addition, respondents make no argument that certain LEU is a separate class or kind based upon the way in which the sale is structured because of differences in the expectations of the ultimate purchasers, the ultimate use of the product, the channels of trade in which the product is sold or the manner in which the product is advertised and displayed. We find that there is no clear dividing line—indeed there is no discernible difference—between LEU regardless of how the transaction is structured.

Second, no party disputes that LEU is a product. Nor does any party dispute that France, Germany, the United Kingdom and the Netherlands is the respective country-of-origin for all LEU produced through enrichment and exported to the United States, regardless of

how the sale transaction is structured. The purpose of the country-of-origin analysis is to determine whether substantial transformation has occurred, in turn producing a *product* from the country in which the substantial transformation takes place. Nothing in the law prohibits a finding of substantial transformation based upon a manufacturing process, such as enrichment, provided the manufacturing process is significant or substantial in nature.

In these investigations, it is undisputed that enrichment accounts for approximately 60 percent of the value of LEU. *See* "Determination of Industry Support for the Antidumping and Countervailing Duty Petitions on Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom," (December 27, 2000) (*Industry Support Memorandum*). In the initiations of these investigations, we found that "USEC performs all of the processes necessary for enriching converted uranium." *Industry Support Memorandum* at 4.[8] No party in these investigations makes the claim that the respective respondent does not perform the necessary processes for enriching converted uranium. We also found that enrichment is a major manufacturing process in the production of LEU, responsible for a substantial portion of the total value of LEU; and that enrichment is a necessary process for the production of

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[8] In our notice of initiation we invited parties to comment on scope issues raised by these investigations. However, to the extent that some of the comments on scope issues re-argue the determination of industry support for the petition, we draw parties attention to Section 702(c)(4)(E) and 732(c)(4)(E) which states in pertinent part: "after the administering authority makes a determination with respect to initiating an investigation, the determination regarding industry support shall not be reconsidered."

LEU. Once again, no party in these investigations disputes these conclusions, nor the underlying facts upon which they are based. In sum, we find no basis to modify the scope to exclude certain shipments of LEU from these investigations based upon how the sale of LEU is structured.

**DEPARTMENT OF COMMERCE**

**International Trade Administration**

**[A-427-818]**

**Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Low Enriched Uranium From France**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**EFFECTIVE DATE:** July 13, 2001.

**FOR FURTHER INFORMATION CONTACT:** Edward Easton or Gabriel Adler, Office of AD/CVD Enforcement 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW Washington, DC 20230; telephone: (202) 482-3003 or (202) 482-3813, respectively.

*The Applicable Statute and Regulations:* Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to Department of Commerce (Department) regulations refer to the regulations codified at 19 CFR part 351 (April 2000).

Preliminary Determination: We preliminarily determine that low enriched uranium is being sold, or is likely to be sold, in the United States at less than fair value (LTFV), as provided in section 733 of the Act. The esti-

mated margins of sales at LTFV are shown in the Suspension of Liquidation section of this notice.

**Case History**

This investigation was initiated on December 27, 2000.[9] *See Initiation of Antidumping Duty Investigations: Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom*, 66 FR 1080 (January 05, 2001) (*Initiation Notice*). Since the initiation of the investigation, the following events have occurred.

In the initiation notice, we invited interested parties to comment, by January 17, 2001, on the scope of this investigation. On January 17, 2001, we received comments from Eurodif, S.A. (Eurodif), the sole producer/exporter of subject merchandise, and its owner, Compagnie Generale des Matieres Nucleaires (Cogema) (collectively, "Eurodif/Cogema" or "the respondent"), as well as from the petitioners. In addition, on April 5, 2001, we received comments from the Ad Hoc Utilities Group (Ad Hoc Group), an industrial user/consumer of subject merchandise. Our analysis of these comments can be found in a memorandum to Bernard Carreau, dated May 7, 2001, on file in the Central Records Unit, Room B-099, of the Main Commerce Building.

On January 22, 2001, the United States International Trade Commission (ITC) preliminary determined that there is a reasonable indication that an industry in the

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[9] The petitioners in this investigation are USEC Inc. and its wholly-owned subsidiary, the United States Enrichment Corp. (collectively USEC), and the Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC, Local 5-550 and Local 5-689 (collectively PACE).

United States is threatened with material injury by reason of imports from France, Germany, the Netherlands, and the United Kingdom of low enriched uranium. *See Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom,* 66 FR 8424 (January 31, 2001).

On January 29, 2001, the Department invited interested parties to submit comments on model matching criteria and proposed modifications to the standard questionnaire. We received comments from Eurodif/ Cogema and the petitioners on January 31, 2001. On February 5, 2001, after considering those comments, the Department requested additional information Eurodif/ Cogema for purposes of formulating and antidumping questionnaire appropriate to the unique nature of the uranium industry. We received a response to that request on February 12, 2001. After considering this information, on February 29, 2001, we issued an antidumping questionnaire to Eurodif/Cogema.[10]

The respondent submitted is initial responses to the Department's questionnaire in April and May of 2001. After analyzing these responses, we issued supplemental questionnaires to the respondent to clarify the initial

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[10] Section A of the antidumping questionnaire requests general information concerning a company's corporate structure and business practices, the merchandise under investigation that it sells, and the manner in which it sells that merchandise in all of its markets. Section B requests a complete listing of all home market sales, or, if the home market is not viable, then a listing of sales in the most appropriate third country market. Section C requests a complete listing of U.S. sales. Section D requests information on the cost of production of the foreign like product and the constructed value of the merchandise under investigation.

questionnaire responses or to request more complete responses to the initial questions.

On April 18, 2001, the Department postponed, by 50 days, the preliminary determination in this case (from May 16, 2001 to July 5, 2001) in accordance with section 733(c) of the Act and 19 CFR 351.205(b)(2). *See Low Enriched Uranium From France, Germany, The Netherlands, and the United Kingdom: Notice of Extension of Preliminary Antidumping Duty Determinations*, 66 FR 20969 (April 26, 2001).

**Postponement of Final Determination**

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise. Section 351.210(e)(2) of the Department's regulations requires that exporters requesting postponement of the final determination must also request an extension of the provisional measures referred to in section 733(d) of the Act from a four-month period until not more than six months. On July 2, 2001, Eurodif/Cogema, the sole producer/exporter of subject merchandise, made such a request. In its request, the respondent consented to the extension of provisional measures to no longer than six months. Since this preliminary determination is affirmative, and there is no compelling reason to deny the respondent's request, we have extended the deadline for issuance of the final determination until the 135th day after the date of publication of this preliminary determination in the **Federal Register**.

**Period of Investigation**

The period of investigation (POI) is October 1, 1999 through September 30, 2000. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition (*i.e.*, December 2000).

**Scope of Investigation**

The scope of this investigation covers low enriched uranium (LEU). LEU is enriched uranium hexafluoride ($UF_6$) with a $U^{235}$ product assay of less than 20 percent that has not been converted into another chemical form, such as $UO_2$, or fabricated into nuclear fuel assemblies, regardless of the means by which the LEU is produced (including LEU produced through the down-blending of highly enriched uranium).

Certain merchandise is outside the scope of this investigation. Specifically, this investigation does not cover enriched uranium hexafluoride with a $U^{235}$ assay of 20 percent or greater, also known as highly enriched uranium. In addition, fabricated LEU is not covered by the scope of this investigation. For purposes of this investigation, fabricated uranium is defined as enriched uranium dioxide ($UO_6$), whether or not contained in nuclear fuel rods or assemblies. Natural uranium concentrates ($U_3O_8$) with a $U^{235}$ concentration of no greater than 0.711 percent and natural uranium concentrates converted into uranium hexafluoride with a $U^{235}$ concentration of no greater than 0.711 percent are not covered by the scope of this investigation.

The merchandise subject to this investigation is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 2844.20.0020. Subject merchandise may also enter under 2844.20.0030, 2844.20.0050, and 2844.40.00. Although the HTSUS sub-

headings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

The Ad Hoc Group contends that certain sales subject to these investigations are in actuality transactions for separative work units (SWU) of enrichment, and therefore constitute the provision of services, not the production or sale of goods subject to the antidumping law.

In particular, the Ad Hoc Group focuses upon the relevant sale to be used in determining whether LEU is sold at less than fair value. The Ad Hoc Group contends that sales of SWU or enrichment do not constitute sales of subject merchandise. They argue further that because "toll-produced LEU" is consumed by the parties who contract for the tolling, such LEU is never sold in the United States. The Ad Hoc Group cites the Department's tolling regulation and practice to support its conclusion that such sales should be excluded from the scope of these investigations.

This is an exceptionally complicated issue. Based upon our analysis of the record and the arguments of the parties, we preliminarily determine that all LEU entering the United States from Germany, the Netherlands, the United Kingdom, and France is subject to these investigations regardless of the way in which the sales for such merchandise are structured.[11] This preliminary determination is based on several factors. First, no party disputes that LEU entering the United States is a good. As the product yield of a manufacturing opera-

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[11] This statement is limited to imports of LEU that were enriched in the respective countries.

tion, LEU is a tangible product. Moreover, under the U.S. Customs regulations, any item that is within a tariff category of the Harmonized Tariff System constitutes merchandise for customs purposes. See 19 CFR 141.4 (2000). In this case, LEU is normally classified under HTSUS 2844.20.0020, but also satisfies three other HTSUS classifications described as enriched uranium compounds, enriched uranium, and radioactive elements, isotopes, and compounds.

Second, it is well established that the enrichment process is a major manufacturing operation that is required to produce LEU. No party disputes that the enrichment operation constitutes substantial transformation of the uranium feedstock, nor does any party dispute that the country of origin for LEU is based upon where that substantial transformation takes place. Thus, the LEU exported from Germany, the Netherlands, the United Kingdom, and France are products of those respective countries, and are therefore subject to these investigations.

Third, in these investigations there are significant volumes of LEU sold pursuant to contracts that expressly provide separate prices for SWU and feedstock, and no party disputes that such sales constitute sales of subject merchandise.[12] Rather, it is only for those transactions in which utility companies arguably obtain LEU through separate transactions of SWU and feedstock from separate entities that the Ad Hoc Group contends that such LEU entering the United States cannot be subject to the antidumping law. The Department has considered whether it would be appropriate to include in

[12] This is also true of a contract for enriched uranium product (EUP) that provides one price for both components.

these investigations only the former type of transactions and exclude the latter. We believe, however, that, based on the petitioners' arguments, discussed below, there is little substantive commercial difference between these types of transactions, and, therefore, we have preliminarily included both. Simply because an unaffiliated customer purchases subject merchandise arguably in the form of two transactions, instead of a single, conventional type of transaction, does not mean that the merchandise entering the United States is not subject to the antidumping law. The purpose of the antidumping law is to provide a remedy to U.S. industries injured by unfairly priced goods. Subject merchandise purchased in the form of two transactions, instead of one, does not eliminate the possibility of unfair pricing, nor does it alleviate the need for the remedy established under the antidumping law.

Fourth, contrary to the Ad Hoc Group's claim, the tolling regulation does not provide a basis to exclude merchandise from the scope of an investigation. The purpose of the tolling regulation is to identify the seller of the subject merchandise for purposes of establishing export price, constructed export price, and normal value. Under § 351.401(h), therefore, the Department focuses upon which party controls the relevant sale of the subject merchandise and foreign like product. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Taiwan, 64 FR 15493, 15498 (Mar. 31, 1999)). Thus, under the tolling regulation the issue is not whether the LEU in question is subject to the antidumping law, but rather who is the seller of the subject merchandise for determining U.S. price and normal value or, more specifically, what is the appropriate way in which to value subject

merchandise and foreign like product. To the extent that sales of subject merchandise are structured as two transactions, the Department would combine such transactions to obtain the relevant price of subject merchandise, or normal value, as appropriate. On the other hand, to the extent that a company located in the United States sells the subject merchandise that is toll-processed in a country subject to investigation, the company in the United States would be the seller of subject merchandise. Even if in these cases we considered the utilities to be the producers of the subject merchandise within the meaning of the tolling regulation, this would not mean the antidumping law is not applicable. Regardless of the appropriate seller identified or how the sales are structured, the merchandise entering the United States is subject to the antidumping law.

The petitioners maintain that enrichers are the sellers of LEU in both types of contracts—either as an exchange of SWU and uranium feedstock for cash, or as an exchange of SWU for cash and a swap of uranium feedstock. The petitioners contend that the two transactions are essentially identical. First, regardless of whether the utility company pays in cash or in kind for the natural uranium content, the petitioners point out that the LEU is delivered under essentially the same contract terms, including warranties and guarantees pertaining to the complete LEU product. Second, enrichers do not use the uranium feedstock provided by the utility companies. Instead, the petitioners note that the natural uranium is typically delivered shortly before, or even after, delivery of the LEU, making the delivery of such uranium a payment in kind for the natural uranium component of the LEU. Third, the petitioners contend that the utility company does not have control over the pro-

cess used to produce LEU that the utility company receives. Rather, the petitioners point out that the enrichers control the manufacture of LEU, as demonstrated by the fact that the product assay under the contract (transactional assay) differs from the product assay produced and delivered by the enricher (operational assay). According to the petitioners, the enricher makes the decision of the particular product assay based upon its own operational requirements and input costs. Taken together, these facts indicate that enrichers are in effect selling LEU under both types of contractual arrangements.

We have preliminarily treated the sales at issue as sales of subject merchandise for the reasons stated above and based upon the petitioners' arguments. In all transactions concerning LEU, regardless of how the sales are structured, the utility companies purchase LEU for use in the production and sale of electricity to consumers. Accordingly, the Department has established the value of the subject merchandise and foreign like product for purposes of determining U.S. price and normal value based on these transactions. We will further examine this issue for the final determination, and we invite comments on this issue. For purposes of these preliminary determinations, we have assigned a value to the natural uranium feedstock where no price was provided. We also invite comments from interested parties as to the valuation of the uranium feedstock for such transactions.

**Fair Value Comparisons**

To determine whether sales of LEU from France were made in the United States at LTFV, we compared the constructed export price (CEP) to the constructed

value (CV), as described in the Constructed Export Price and Normal Value sections of this notice. In accordance with section 777A(d)(1)(A)(i) of the Act, we calculated weight-average CEPs and compared them to CV.

We note that during the POI, the respondent sold LEU pursuant to different types of contracts. For some contracts, the respondent undertook to manufacture and deliver LEU for a cash payment covering both the value of the enrichment component and the value of the natural uranium feedstock contained in the LEU (so-called EUP contracts). For other contracts, the respondent undertook to manufacture and deliver LEU for a cash payment covering only the value of the enrichment component; for the natural uranium feedstock component, the respondent received an amount of natural uranium equivalent to the amount used to produce the LEU shipped (so-called SWU contracts). For both types of transactions, the product manufactured and delivered by the respondent was LEU. For purposes of our antidumping analysis, we have translated prices and costs involved in SWU contracts to an LEU basis, increasing those values to account for the cost of the uranium feedstock involved. These adjustments are described in greater detail below.

**Constructed Export Price**

In accordance with section 772 of the Act, we calculated a CEP. Section 772(b) of the Act defines CEP as the price at which the subject merchandise is first sold in the United States before or after the date of importation by or for the account of the producer or exporter of the merchandise or by a seller affiliated with the producer or exporter, to an unaffiliated purchaser, as ad-

justed under sections 772(c) and (d) of the Act. Consistent with this definition, we found that Eurodif/Cogema made CEP sales during the POI because the sales were made for the account of Eurodif/Cogema by the respondent's U.S. subsidiaries, Cogema, Inc. and Urangesellschaft USA, Inc. (UG Inc.), in the United States.

We calculated CEP based on packed prices charged to the first unaffiliated customer in the United States. For sales involving cash payments on a SWU basis, we translated the prices to an LEU basis by adding a value for the uranium feedstock used in the production of the LEU. This value was derived from the respondent's average cost of uranium feedstock purchases during the POI.

Section 351.401(i) of the Department's regulations provide that the date of sale will normally be the date of invoice, unless the material terms of sale are set on some other date. In the instant case, the material terms of sale are set on the date of the contract with the U.S. customer. Therefore, we based the date of sale on that date.

Because many of these contracts are long-term, spanning over five years, in most instances there have been only partial deliveries to date pursuant to POI contracts. Under the long-term contracts, the LEU provider is obligated to supply a percentage of the utility's overall requirements for given periods of time. The LEU provider does not know the specifications for the desired enrichment level of a given shipment of LEU until it receives delivery instructions for particular shipments of LEU. The desired enrichment level (or "product assay") determines the price for each specific delivery. Given the speculative nature of estimating the pro-

duct assays to be associated with future shipments of LEU for which no delivery instructions exist (as well as the fact that exchange rates, selling expenses, and costs of production for future deliveries pursuant to POI contracts would also have to be estimated), we have decided, preliminarily, to base the dumping analysis on completed deliveries only.

We note that two of the sales during the POI involved pre-existing contracts, which were amended during the POI. The petitioners have argued that, while the Department typically includes in its dumping analysis the entire sales quantity covered by an amended contract, the long-term nature of uranium contracts warrants including in the analysis only the additional quantities associated with the amendments. Further, the petitioners argue the Department should isolate the prices for the additional quantities called for by the amendments, segregating them from prices specified by the pre-existing contracts. For purposes of this preliminary determination, consistent with past practice, we have considered the amended contract to constitute a new sale, and have included in the dumping analysis all deliveries pursuant to the amended contract up to the date of the initial questionnaire response. We will examine this issue further at verification, and invite comment from interested parties for the final determination.

We made deductions from the starting price for movement expenses in accordance with section 772(c)(2)(A) of the Act. These include foreign inland freight from the plant to the French port of exit, international freight, international air freight/insurance, charges for shipment of samples, U.S. brokerage and

handling fees, and port charges. We also deducted any discounts from the starting price.

In addition, in accordance with section 772(d)(1) of the Act, we deducted from the starting price those selling expenses that were incurred in selling the subject merchandise in the United States, including indirect selling expenses, credit expense, and inventory carrying costs.

Finally, in accordance with 772(d)(3) and 772(f) of the Act, we made a deduction for CEP profit. The CEP profit rate is normally calculated on the basis of comparison market sales and U.S. sales. In this case, there were no home market or viable third-country market sales of LEU during the POI. Therefore, we based the CEP profit calculation on the profit rate of the respondent's U.S. affiliate(s) that had a profit during the POI.

**Normal Value**

*A. Selection of Comparison Markets*

Section 773(a)(1) of the Act directs that NV be based on the price at which the foreign like product is sold in the home market (or third country market), provided that the merchandise is sold in sufficient quantities (or value, if quantity is inappropriate) and that there is no particular market situation that prevents a proper comparison with the CEP. The statute contemplates that quantities (or value) will normally be considered insufficient if they are less than five percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States. Eurodif/Cogema did not have a viable comparison market during the POI. Therefore, we have based NV on CV. Adjustments made in deriving

the CV are described in detail in the *Calculation of Normal Value Based on Constructed Value,* below.

*B. Calculation of Normal Value Based on Constructed Value*

Section 773(a)(4) of the Act provides that where NV cannot be based on comparison market sales, NV may be based on CV. Section 773(e) of the Act provides that CV shall be based on the sum of the cost of materials and fabrication for the foreign like product, plus amounts for selling, general, and administrative expenses (SG&A), profit, and U.S. packing costs. We calculated a weight-averaged cost of production (COP) for each control number of LEU, based on the sum of the cost of materials, fabrication and general expenses, and packing costs. We relied on the data submitted by the respondent in its supplementary questionnaire response except in specific instances where the submitted costs were not appropriately quantified or valued.

Specifically, we adjusted the reported costs as follows:

(1) We included the cost of centrifugal separation studies (which had been excluded by the respondent) in the calculation of the general and administrative expenses rate.

(2) We recalculated the net interest ratio on the basis of the consolidated interest expenses of Cogema's parent, CEA Industrie, for the year ended December 31, 1999.

For some deliveries pursuant to contracts based on SWU prices, the respondent's reported costs did not include a value for the uranium feedstock used in the production of the delivered LEU. To translate the reported

costs to an LEU basis, we added to the reported costs a value for the uranium feedstock used in the production of the LEU. This value was derived from the respondent's average cost of uranium feedstock purchases during the POI.

We note that, during the POI, Eurodif/Cogema obtained electricity from Electricite de France (EDF), an affiliated French utility. Section 773(f)(2) of the Act provides that the Department may value any element obtained from an affiliate at the market value of the element, if the transfer price does not fairly reflect a market value (the "transactions disregarded" rule). In the instant case, the rate charged by EDF to Eurodif/Cogema is below that charged to other large industrial users. However, the record indicates that Eurodif/Cogema is by far the largest consumer of electricity in France. The rate charged by EDF to Eurodif/Cogema appears to be commensurate with the respondent's massive consumption of electricity. Moreover, there is evidence on the record that at least one unaffiliated European electricity provider offered electricity to Eurodif/Cogema at rates even lower than that charged by EDF. Given the facts of this case, we have preliminarily determined to rely on the transfer price for electricity reported by Eurodif/Cogema. We will examine this further at verification.

Because there is no viable comparison market for Eurodif/Cogema, and hence no actual company-specific profit data available for Eurodif/Cogema, we calculated profit in accordance with section 773(e)(2)(B)(iii) of the Act and the Statement of Administrative Action (SAA) at 841. (Where, due to the absence of data, the Department cannot determine amounts for profit under alter-

natives (i) or (ii) of section 773(e)(2)(B) of the Act or a "profit cap" under alternative (iii) of section 773(e)(2)(B) of the Act, the Department may apply alternative (iii) on the basis of the facts available.) In this case, we based CV profit on the profit rate on the 1999 financial statements of CEA Industrie, a holding company for the industrial interests of the French Atomic Energy Commission, which consolidates the financial results of the respondent and other companies associated with the French nuclear industry.

**Level of Trade/CEP Offset**

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (LOT) as the export price (EP) or CEP transaction. The NV LOT is that of the starting-price sales in the comparison market or, when NV is based on CV, that of the sales from which we derive SG&A expenses and profit. For EP, the U.S. LOT is also the level of the starting-price sale, which is usually from exporter to importer. For CEP, it is the level of the constructed sale from the exporter to the importer.

To determine whether NV sales are at a different LOT than EP or CEP, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the NV level is

more remote from the factory than the CEP level and there is no basis for determining whether the difference in the levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP offset provision). See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa, 62 FR 61731 (November 19, 1997).

In implementing these principles in this investigation, we obtained information from the respondent about the marketing stages involved in the reported U.S. sales, as well as in the home market,[13] including a description of the selling activities performed by the respondent for each channel of distribution. Given that all U.S. sales were CEP sales, we considered only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act.

In the U.S. market, the respondent sells to utility customers. After deducting expenses associated with the selling activities reflected in the price under section 772(d) of the Act (i.e., the expenses of Cogema Inc. and Urangesellschaft), we noted selling expenses associated with strategic planning and marketing, customer sales contact, production planning and evaluation, and contract administration. These expenses did not vary by U.S. channel of distribution. Therefore, we found all U.S. sales to be made at single LOT.

Home market selling expenses for CV were based on the selling expenses of Cogema for pre-POI home mar-

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[13] Although the home market was not viable, for the purpose of calculating CV, the respondent provided POI home market selling expenses (related to pre-POI contracts) in its questionnaire responses.

ket contracts. We have no basis for attributing different expenses to different channels of distribution. Therefore, we found a single LOT of trade in the home market.

The respondent generally performs the same kinds of selling functions in both markets. Although the respondent described different degrees of selling activities associated with home market sales and U.S. sales by characterizing the levels of different activities as "low," "medium" or "high," the respondent did not explain the distinctions between these terms with respect to the different categories of selling activities, leaving these terms ambiguous. Therefore, we have no basis for concluding whether or not a CEP offset to normal value is appropriate and we did not calculate a CEP offset. We will examine this further at verification.

**Currency Conversions**

We made currency conversions into U.S. dollars in accordance with section 773A of the Act based on exchange rates in effect on the dates of the U.S. sales, as obtained from the Federal Reserve Bank (the Department's preferred source for exchange rates).

**Verification**

In accordance with section 782(i) of the Act, we intend to verify all information relied upon in making our final determinations.

**Suspension of Liquidation**

In accordance with section 733(d) of the Act, we are directing the Customs Service to suspend liquidation of all entries of low enriched uranium from France that are entered, or withdrawn from warehouse, for consumption

on or after the date of publication of this notice in the **Federal Register.**[14] We are also instructing the Customs Service to require a cash deposit or the posting of a bond equal to the weighted-average amount by which the NV exceeds the CEP, as indicated in the chart below. These instructions suspending liquidation will remain in effect until further notice.

The weighted-average dumping margins are as follows:

| Exporter/manufacturer | Weighted-average margin percentage |
|---|---|
| Eurodif/Cogema..... | 17.52 |
| All Other..... | 17.52 |

**Disclosure**

The Department will disclose calculations performed within five days of the date of publication of this notice to the parties of the proceedings in this investigation in accordance with 19 CFR 351.224(b).

**ITC Notification**

In accordance with section 733(f) of the Act, we have notified the ITC of our preliminary determination. If our final antidumping determination is affirmative, the ITC will determine whether the imports covered by that determination are materially injuring, or threaten mate-

[14] On July 3, 2001, the Department received comments from the respondent requesting that, in the event of an affirmative preliminary determination, the application of any cash deposit, bond or other security be limited to transactions involving the sale of enriched uranium, and exclude imports pursuant to so-called SWU contracts. We will consider these comments for the final determination.

rial injury to, the U.S. industry. The deadline for that ITC determination would be the later of 120 days after the date of this preliminary determination or 45 days after the date of our final determination.

**Public Comment**

Case briefs for this investigation must be submitted no later than one week after the issuance of the verification reports. Rebuttal briefs must be filed within five days after the deadline for submission of case briefs. A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes.

Section 774 of the Act provides that the Department will hold a hearing to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by any interested party. If a request for a hearing is made in an investigation, the hearing will tentatively be held two days after the deadline for submission of the rebuttal briefs, at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. In the event that the Department receives requests for hearings from parties to more than one low-enriched uranium case, the Department may schedule a single hearing to encompass all those cases. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request within 30 days of the publication of this notice. Requests should specify the number of participants and

provide a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs.

We will issue our final determination no later than 135 days after the date of publication of this notice in the **Federal Register**.

This determination is issued and published pursuant to sections 733(f) and 777(i)(1) of the Act.

Dated: July 5, 2001.

**Faryar Shirzad,**

*Assistant Secretary for Import Administration.*

BEFORE THE UNITED STATES DEPARTMENT
OF COMMERCE

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Investigation Nos. A-427-818,
A-412-820, A-428-828, A-421-808,
C-427-819, C-428-829, C421-809,
C-412-821

IN THE MATTER OF LOW ENRICHED URANIUM FROM FRANCE, GERMANY, THE NETHERLANDS, AND THE UNITED KINGDOM

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# COMMON ISSUES BRIEF ON BEHALF OF THE AD HOC UTILITIES GROUP

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**PUBLIC VERSION**

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October 22, 2001

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* * * * *

## I. THE FACTS: IT IS INCONTROVERTIBLE THAT ENRICHMENT CONTRACTS ARE CONTRACTS FOR SERVICES

By now, the Department is well familiar with the four steps in the production of nuclear fuel assemblies: (1) the purchase of natural uranium in the form of U3O8 or "yellowcake;" (2) chemical conversion of the U3O8 to natural uranium in the form of UF6; (3) enrichment of the UF6 in the uranium isotope U235 up to 5% weight percent U235; and (4) fabrication of fuel assemblies, with the fobricator converting the enriched UF6 into uranium oxide fuel pellets to be loaded into the fuel rods in the fuel assemblies. Each step requires a separate procurement contract, generally with separate parties occupying distinct market segments.

The Department also knows that the utilities themselves arrange for the vast majority of LEU they consume by entering into separate contracts for each element of the production process. Thus, typically, the utilities purchase U3O8 from mining companies, and then enter into toll service contracts with conversion service providers, enrichment service providers, and fabrication service providers that ultimately result in the production of the nuclear fuel assemblies for the utilities' own consumption. Where a utility enters into a contract for enrichment services, it pays the enricher only for that service.

Utilities also sometimes purchase LEU as a product, in which case it is commonly referred to as Enriched Uranium Product ("EUP"). Contracts for sales of EUP sometimes have a single, per kilogram price, and other

times contain separate prices for the enrichment services and uranium feed associated with the EUP that will be delivered. In both cases, however, the utilities pay the seller a price that reflects all elements of the full value of the LEU.

We trust that the Department has now had the opportunity to actually review copies of the different types of contracts and has seen the clear differences between contracts for enrichment services and contracts for EUP. Most importantly, enrichment services contracts by their own terms are for the sale and purchase of a service, and provide for payment only for that service (denominated in a price per "SWU"—separative work unit).[4] They do not contain a price that reflects all elements of the value of the LEU; there is no payment for the cost of the U3O8 nor the conversion services applied to that material.

In the view of the Utilities Group, *this fact alone should compel the Department to make a factual finding that enrichment services contracts are indeed contracts for services*. Other aspects of the transactions, and the manner in which they are treated in other legal contexts, simply reinforce what is already obvious. In particular:

- *The utilities retain ownership of the uranium feed provided to the enrichers.* The services contracts oblige the utilities to deliver the uranium feed to be enriched, and to retain title to that feed

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[4] SWUs are not physical components of LEU. Rather, "SWU" is a measurement of the amount of energy expended to enrich uranium to a specific isotope level. As a unit of measurement, it is analogous to a "man-hour."

while it is in the possession of the enricher.[5] In that regard, enrichers do not treat the receipt of the feed as "payment in kind" or income of any type, nor report the utilities' feed held in inventory as assets belonging to the enrichers on their balance sheets.[6] As discussed in the Utilities Group's October 19th submission in the captioned antidumping investigations, established principles of contract law require the Department to respect the terms of the relevant contracts, and prohibit it from imputing terms that alter the contractual relationship established through those terms.[7]

- *The U.S. Court of Federal Claims has held repeatedly, at the urging of the U.S. government,*

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[5] In the United States, where there is a potential for property taxes to be assessed on uranium feed held in inventory, the utilities remain liable for payment of that tax even when the feed is physically in the possession of the enricher.

[6] The Department has commented in a very similar case that "although a toller may take title to the product while it is physically in that company's production facility, it generally does so for purposes such as indemnification against the risk of loss (*e.g.*, fire, theft, non-payment by the company for whom the production is subcontracted, etc.)." *Taiwan Semiconductor Mfg. Co., Ltd. v. United States*, Consol. Ct. No. 98-05-02184, Slip Op. 00-48 (June 30, 2000) ("Remand Response") at n.7. This is the only manner in which enrichers conceivably could be considered to have title to the feed provided by the utilities. In the TSMC redetermination, the Department found this insufficient to support a finding that TSMC "owned" the subject merchandise.

[7] *See generally* Utilities Group's October 19, 2001 Rebuttal Comments on the Petitioner's Proposed "Effective Sale" methodology.

*that enrichment contracts are for the sale of services, not goods.*[8]

- *Not only the price terms, but also the non-price terms of EUP contracts are materially different from those of enrichment contracts.* In sales of EUP, for example, the utilities may only specify the assay of the LEU. For sales of enrichment services, the utilities specify both the assay of the LEU and the assay of the tails, which dictates the amount of uranium feed to be provided by the utility as well as the amount of work to be performed by the enricher on each unit of uranium feed. Under services contracts, the utilities may freely adjust the LEU assay, tails assay, and quantity of uranium feed for each delivery and

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[8] The federal courts have ruled at least three times that enrichment services contracts provide for the sale of services, not goods. In *Barseback Kraft AB v. United States*, 36 Fed. Cl. 691, 705 (1996), *aff'd* 121 F.3d 1475 (Fed. Cir. 1997) the court held that

> [u]nder the contracts, the individual utilities supply the USEC with the uranium. The USEC then enriches the uranium and returns to the customer uranium enriched to the customer's specifications. The price paid by the customer is based on the number of SWUs required to enrich the uranium to the customer's specifications. It is clear, then, from the process itself, that the customers are contracting for services, not goods, from the USEC. The U.C.C. does not apply to services contracts—it applies to the purchase of goods.

*See also Centerior Service Co. v. United States*, 1997 U.S. Claims LEXIS 323, Slip Op. 95-103c (Dec. 29, 1997) (reaffirming the results of *Barseback* with respect to domestic utilities); *Florida Power & Light Co. v. United States*, 49 Fed. Cl. 656 (2001) (finding that utility service contracts for uranium enrichment are contracts for services). It would be extraordinary if the Department simply were to ignore these holdings.

generally do so depending on the relative prices of uranium feed, enrichment services, and tails flexibility.

- *The designated country of origin of the uranium feed must match that delivered by the utility.* Unless otherwise agreed, enrichment services contracts require enrichers to deliver finished LEU containing uranium feed material designated with the same country of origin as that delivered by the utility.[9]

The petitioner has previously argued that, because uranium feed is physically fungible, it cannot be known for certain whether an enricher is delivering LEU containing the exact same feed delivered by the utilities. In making this argument, the petitioner tries to imply that enrichers perform enrichment on uranium feed that the enrichers own, and effectively sell that feed to the utilities. The petitioner does not state this expressly, however, because it knows it is wrong. The enrichers hold inventories of uranium feed as bailees for their utility customers; if a particular delivery of LEU does not contain the exact same physical feed as that delivered by the utility, it is feed delivered to the enricher by another utility, which the enricher was also holding as a bailee.[10]

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[9] However, the contracts generally do not specify in what country the LEU must be enriched, allowing USEC to deliver Russian or U.S. enrichment services to the utilities at its own option.

[10] Incidentally, the short lead times for delivery of feed cited by USEC are more typically offered by USEC itself, not the respondents, and the LEU delivered by USEC under enrichment contracts in any event usually is Russian LEU that it has had no role whatsoever in producing. USEC certainly does not "own" the uranium feed associated with the Russian LEU, as it is under a strict legal obligation to return

Consequently, the fungibility of the feed does not alter the actual commercial terms of the contracts or the nature of the transaction.[11]

Given the overwhelming evidence that enrichment contracts are in fact contracts for services, the next question is whether the governing statute authorizes the Department to deem those contracts, as a matter of law, to be sales of subject merchandise for purposes of the antidumping and countervailing duty investigations. As discussed below, the statute provides no such authorization.

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that feed to Russia. USEC Privatization Act, 42 U.S.C. § 2297h. Thus, to ignore the commercial realities of how the industry deals with the fungibility of uranium feed would lead to the conclusion, among others, that USEC is illegally selling Russian-origin feed in the United States as well as essentially evading the Russian Suspension Agreement. It would be arbitrary for the Department to treat USEC's sales as sales of enrichment services for purposes of the Russian Suspension Agreement and the Privatization Act while treating the respondents' sales of enrichment services as sales of goods in these investigations.

[11] In its August 17 letter to the Department requesting that LEU be excluded from the scope of the investigations if imported for further processing and later export, USEC saw no problem in maintaining the identity of fungible LEU:

> Because of the fungible nature of the subject merchandise, the LEU contained in the exported uranium dioxide or fuel assemblies likely will not be the same LEU that was imported under certification. USEC intends for this exemption to apply so long as the importer can certify that an amount of LEU equivalent to the amount entered under certification . . . is exported from the United States . . . .

Letter from Steptoe & Johnson to Secretary Evans (Aug. 17, 2001) p. 6, n.5. This statement cannot be reconciled with USEC's argument that the fungibility of uranium feed prevents its ownership from being traced.

## II. RELEVANT SALES ARE ONLY THOSE SALES THAT REFLECT ALL ELEMENTS OF THE VALUE OF THE SUBJECT MERCHANDISE

This is not the first time that the Department has confronted the issue of whether sales of manufacturing services can be treated as sales of subject merchandise. In fact, many of the same arguments advanced by the petitioner in support of its position that the respondents should be deemed to be selling goods instead of services were expressly rejected by the Department and the Court of International Trade in connection with the recent remand determination in *Taiwan Semiconductor Manufactv ring Co., Ltd. v. United States*, 143 F. Supp. 2d 958 (2001) (hereinafter "TSMC Case"). Because of the close factual similarities between that case and the pending investigations, we discuss that case in detail below.

The TSMC Case arose out of the Department's antidumping investigation of SRAMs (static random access memory semiconductor devices) from Taiwan. Taiwan Semiconductor Mfg. Co., Ltd. ("TSMC") is a company located in Taiwan that produced and sold SRAMs wafers to unaffiliated companies in the United States and Taiwan. Although some further processing of the wafers was required to convert them into finished SRAM's, the Department viewed the production of the wafers as the major physical operation in the manutacture of SRAMs.[12]

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[12] Thus, the Department initially determined that TSMC, rather than another Taiwanese company * * * .

transaction to be treated as a sale in the United States where the seller does not control the price to the U.S. purchaser.[27]

### B. Where the Utilities Arrange for Production of LEU Through a Series of Unrelated Transactions, There is No Relevant Sale of the Subject Merchandise

Where the utilities arrange for the production of LEU through a series of independent contracts with distinct suppliers of U3O8, conversion services, and enrichment services, at no point is there a "relevant sale" because there is no sale of subject merchandise that encompasses the value of all essential components of that merchandise, and no sale by a party capable of controlling the price of the subject merchandise for import into the United States.

#### 1. Sales of Enrichment Services Are Not Sales of Subject Merchandise

As described above, the Court of International Trade has left no doubt that the sale of a service cannot qualify as a sale of subject merchandise for purposes of finding a relevant sale. The circumstances surrounding the pro-

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[27] The Department cited this case for the following proposition:

> We normally consider the producer to be the party that sets the price to the United States except in cases where the producer does not know that the subject merchandise is ultimately destined for the United States. In those cases, *we find that a subsequent reseller controls the relevant sale, rather than the producer.*

(Emphasis added). TSMC Remand Response at n. 5. Consequently, it is not necessary for the seller to have any involvement in manufacturing the merchandise in order for its sales to be deemed the relevant sales.

vision of uranium enrichment services are even more compelling than those already ruled upon in the TSMC Case. The enrichment service providers do not produce the uranium feedstock; they do not take title to it; and they sell only their own enrichment services. The supplied uranium feed, like the design of the SRAM wafers, is provided to the enrichment service providers only in bailment. As with TSMC, the enrichers in these transactions sell manufacturing services, not subject merchandise.

Moreover, sales of enrichment services plainly do not encompass the entire value of the subject merchandise. The respondents are not paid for the U3O8 or its conversion, because those elements of the production process are separately arranged and paid for by the utilities.

**2. There Are No Sales by a Party in a Position to Set the Price of LEU Sold on or into the U.S. Market**

When entering into enrichment services contracts, the enrichers have no control whatsoever over the full cost of the LEU that is ultimately delivered, and indeed do not know that value. As such, they are not in a position to set the price of that LEU as sold in or to the U.S. market. For this reason as well, the sale of enrichment services can not be deemed by the Department to constitute a relevant sale of subject merchandise.

We emphasize that the Department cannot legitimately find a relevant sale where it would not normally find one simply because there are no other transactions in the chain of commerce that qualify.

## III. THE DEPARTMENT'S PRELIMINARY ANTIDUMPING DETERMINATION WAS CONTRARY TO THE STATUTE AND THE DEPARTMENT'S OWN PAST PRACTICE

The Department's preliminary antidumping determinations in the pending investigations took a directly contrary approach to determining relevant sales as that followed in the TSMC Case and the other precedents discussed above. In its determination, the Department acknowledged that the Utilities Group "focuses upon the relevant sale to be used in determining whether LEU is sold at less than fair value," but instead of evaluating that issue, the Department reviewed factors more commonly viewed as pertinent to a decision on standing or on whether a * * * .

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duty investigations. The memorandum purported to address the arguments of the Utilities Group and the respondents that sales of enrichment services are not sales of subject merchandise, and consequently are not subject to the antidumping and countervailing duty laws.

The Department's analysis of the issue in fact focused on a different question, namely whether LEU produced pursuant to a contract for LEU is physically different than LEU produced pursuant to a contract for enrichment services. The Department simply conducted its traditional scope analysis and employed the five-factor test known as "Diversified Criteria" (physical characteristics, expectations of the ultimate purchasers, the ultimate end use of the product, the channels of trade,

and methods of advertising and display),[39] leading to the conclusion that there was no difference between LEU delivered under contracts for enrichment services and contracts for LEU itself. This conclusion, however, does not lead to the presumption that sales of LEU and sales of enrichment services are the same.

Since there are no relevant sales of subject merchandise in circumstances where members of the Utilities Group contract with the respondents to provide enrichment services, LEU enriched through enrichment services contracts must be excluded from any imposition of antidumping or countervailing duties that may be applied as a result of this investigation.

### B. No Legitimate Issue of "Circumvention" Has Been Properly Raised

The Utilities Group understands that the Department, at the urging of the petitioner, may be uncomfortable with the idea that subject merchandise entering the United Stales is not sold in the United States, and be concerned that the utilities' role in arranging for the production of their own LEU results in evasion of the trade remedy law. Nothing could be further from the truth. The manner in which utilities procure LEU (actually, the manner in which utilities procure nuclear fuel assemblies; LEU is only the third stage in a four-stage production process) longs predates both the privatization of USEC and the first trade remedy case involving uranium, which was initiated in 1989.

The four-step procurement process for nuclear fuel by electric utilities that own and operate nuclear plants

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[39] 19 C.F.R. § 351.225(k)(2).

was established by necessity to accommodate the critical role in the process reserved by the Government to itself prior to the privatization of USEC in 1998.[40] Over time, the utilities learned through experience that controlling each of the four steps was important to minimize the risk of delays in fuel procurement and the risk of price fluctuations of the nuclear fuel components.

The existing 103 operating nuclear plants in the United States were ordered in the 1960's and 1970's. At the time a contract was signed with a nuclear reactor vendor, the utility also signed a contract with the U.S. Government (acting first through the Atomic Energy Commission, then the Energy Research and Development Agency, and finally the Department of Energy) for toll uranium enrichment services.[41] There was no alternative for U.S. utilities to obtain uranium enrichment services. Consequently, a long-term enrichment services contract with the U.S. Government was a *sine qua non* of demonstrating to State and federal regulators the ability to operate the nuclear plant economically and to obtain certificates of convenience and necessity and construction permits.

In some of the early nuclear plant procurements, the reactor vendors agreed to provide fuel for the first full reactor core and some number of reloads. The reactor

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[40] As noted above, the four steps are the purchase of natural uranium in the form of U3O8, the arrangement of conversion of the U3O8 into UF6, the enrichment of the UF6, and the fabrication of that material into nuclear fuel assemblies.

[41] The first commercial nuclear plants actually leased enriched uranium from the U.S. Government prior to the Private Ownership Act, which amended Section 161 of the Atomic Energy Act in 1964 to allow utilities to own enriched uranium.

vendors were also the fuel fabricators. These separate contracts for fabricated fuel with the reactor vendors incorporated the utility's contract with the U.S. Government to provide the critical uranium enrichment step of the process. The reactor vendor undertook to procure the natural uranium and conversion services, deliver the UF6 to the U.S. Government enrichment facility, take delivery of the enriched UF6, and finally fabricate the fuel assemblies. In particular, Westinghouse Electric Corporation entered into a number of such contracts to provide the initial fabricated assemblies for the reactor core and the first few reloads. In the early 1970's. the price of natural uranium skyrocketed from approximately $5 per pound as U3O8 to over $40 per pound. Westinghouse has priced nuclear fuel assemblies based on uranium at much lower prices and had not contracted to obtain sufficient uranium at such prices. Westinghouse breached more than a dozen contracts, asserting commercial impracticability, impossibility of performance and force majeure. After years of litigation, Westinghouse was unsuccessful in its defenses and the cases eventually settled.

The utilities determined, based on this painful experience, that it was more prudent and reduced the risk of uncertainty of supply and price variations to control all four steps of the nuclear fuel procurement process. Utilities sought to diversify their supply by entering into a variety of long-term and short-term contracts for natural uranium, conversion services, and fuel fabrication services, and sought to avoid buying all of their fuel cycle needs from one supplier.

By 1984, the uranium fuel cycle markets had shifted into an oversupply position. Numerous utilities had can-

celled nuclear plants after the Three Mile Island accident and the demand for uranium, conversion, enrichment and fuel fabrication had dramatically contracted. The Department of Energy reacted to the loss of its European market to European competitors by offering a new contract to all of its uranium enrichment customers which allowed the utilities to purchase up to 30% of their uranium enrichment services from other utilities with cancelled plants and fixed commitment contracts for uranium enrichment services or from foreign competitors. Thus the utilities were able to reduce nuclear fuel costs by taking advantage of competition specifically encouraged by the Department of Energy in entering into the new Utility Services Contract.

It is this historical experience, in large degree driven by policy decisions of the U.S. Government and perturbations in the relevant markets caused by supply and demand—again often influenced by U.S. Government policies, that has led utilities to adopt procurement strategies that seek to minimize risk and price by diversification and control of each step of nuclear fuel procurement. Accordingly, utility procurement practices were not in any way driven by U.S. trade law, rather USEC has attempted to recreate history by re-characterizing the toll enrichment services step in the nuclear fuel procurement process as a purchase of a commodity in an attempt to monopolize a vital service to nuclear plant owners.

It is instructive that the utilities purchase enrichment services from USEC in the same manner as they purchase them from the respondents, and indeed purchased enrichment services from USEC and its predecessor, the Department of Energy, in this manner years

before they ever entered into any transactions with the respondents.

Significantly, the resulting nuclear fuel is consumed by the utilities in their nuclear power plants, and is not a component of any product that is later sold within the United States. Consequently, this is not an issue of identifying a different respondent, because there does not exist any appropriate respondent for sales of LEU imported pursuant to enrichment services contracts.

### C. Including Sales Of Services Within The Scope Of The Investigations Would Be Directly Inconsistent With The WTO Antidumping Agreement And The General Agreement On Trade In Services

The WTO agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Antidumping Agreement") limits its application to sales of dumped *products*. Article 2 of the Antidumping Agreement provides that "a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported . . . is less than the comparable price . . . for the like product when destined for consumption in the exporting country." As is clear from the language of Article 2, the Antidumping Agreement requires that a finding of dumping must be limited to a comparison of the "export price" of the "product" with the "comparable price" for the "like product" in the home country. There is no ambiguity that the member governments may only consider sales of products in this regard.[42]

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[42] The application of countervailing duties to sales of services would also be inconsistent with the WTO Agreement on Subsidies and Coun-

If there were any remaining question as to whether sales of enrichment constituted sales of a product or a service, the General Agreement on Trade and Services ("GATS") and the U.S. negotiating position on energy services have made clear that enrichment services are just that—

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tervailing Measures.

[1]

BEFORE THE UNITED STATES DEPARTMENT OF COMMERCE INTERNATIONAL TRADE ADMINISTRATION HEARING

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Nos. A-412-820; A-427-818, A-421-808, A-428-828, C-427-819, C-428-829, C-421-809 and C-412-821

**PUBLIC DOCUMENT**

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IN THE MATTER OF LOW ENRICHED URANIUM FROM FRANCE, GERMANY, THE NETHERLANDS AND THE UNITED KINGDOM

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Wednesday, October 31, 2001

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The hearing was held at 10:00 a.m. in Room 3407 of the Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C., Bernard Carreau, Hearing Examiner, presiding.

DEPARTMENT OF COMMERCE:

BERNARD CARREAU
MELISSA SKINNER
DAVID MASON
WENDY FRANKEL
JONATHAN LYONS
HOWARD HURWITZ

* * * * *

[43] Back in the 1960s and '70s, when nuclear power plants were being constructed, the Department of Energy had a monopoly on enrichment in the United States. The Government felt the technology was sensitive, and they wanted to keep it to itself.

Utilities usually had to show they had an enrichment contract with the Department of Energy just to get licensing approval to build and operate a plant. It was how they showed the regulators that they would be capable of operating.

At the same time Department of Energy offered no other services. It wasn't selling U308, it wasn't selling EUP as a finished product, it wasn't selling fuel assemblies. So the utilities were on their own for everything except the enrichment service process.

The companies that were building the power plants, in particular Westinghouse, offered a solution that involved piggybacking on the utilities enrichment services contracts with DOE.

They would take care of procuring the U3O8 and getting it converted, then deliver the UF6 to DOE, [44] under the utilities enrichment contracts, pick it up after enrichment, and fabricate it into fuel assemblies, one stop shopping.

In the end, however, Westinghouse didn't do a very good job of managing the program. When the price of uranium shot up Westinghouse found that it didn't have sufficient supply available at the old prices to fulfill its contracts with the utilities for uranium.

It notified the utilities that it was going to breach its contracts on the basis of commercial impossibility. In other words, it didn't want to lose lots of money by having to buy uranium at the new, higher price.

As you might imagine this resulted in an enormous and very expensive controversy. It was eventually settled, but the utilities learned their lesson. They weren't going to put all their eggs in one basket again.

They became general cotransactions for the production of nuclear fuel assemblies. And they managed each step of the process themselves. [45] Accordingly, utilities typically enter into separate contracts with the mining companies that provide the uranium, the conversion service providers, the enrichment service providers, and the fabrication service providers.

Utilities developed their own methodologies for hedging against supply and price disruptions. They enter into both long-term contracts and spot contracts with multiple suppliers.

And it is important to note there are distinct markets for each step of the production process. And that the prices in those markets do not move in tandem.

In other words, sometimes the market price of uranium goes up, while at the same time the market price for SWUs is going down.

Utilities do their best to gauge these shifts and implement their procurement strategies in a manner in which they try to get the lowest overall costs and lower risks over the long term.

For example, if a utility happens to have a contract for uranium with a relatively low price, [46] and the

price it has to pay for SWUs is relatively high, the utility might choose to deliver more uranium and pay for less SWUs.

If the situation is the reverse, they might deliver less uranium and have more SWUs applied to it. The end result is the same, but the utility's overall costs may be quite different.

In recent years enrichers, specially USEC itself, have started offering sales of EUP. For those contracts the enricher takes on the responsibility of supplying the uranium, and the conversion service, as well as the enrichment service.

If the entire package is offered at a good price sometimes procuring some LEU through an EUP transaction fits into the utility's overall procurement strategies.

But we don't know of any utility that procures LEU exclusively through EUP contracts, or has any plans to. There is no circumvention here, no one has changed their behavior to get around anti-dumping or countervailing duty order.

Utilities have been procuring LEU this way

* * * * *

[57] respect to temporary importation. It is a fungible commodity. But because a fungible commodity is involved you can't properly take the provision of that commodity and its return following enrichment, as a payment in kind, which has never been the way that any player in this business has treated it.

It is not on our books, as has been established at verification. It is not on USEC's books as its material when it receives it from its customers. Rather USEC makes

very, very clear, that the uranium provided by its customers is the property of its customers.

And they make it so clear as to impose the property tax liability for the uranium on its customers. So to say that USEC or Eurodif, or I assume URENCO, has received a payment in kind, when it received uranium feed for enrichment, is simply a fiction, inconsistent with any books and records that have ever existed, or any books and records in the verified submissions in these cases.

Country of origin. That, too, was cited by the Department, that nobody disputes that the [58] origin of the material is where the enrichment takes place. I'm sorry, I dispute it. We dispute that vigorously.

And the Department, and all of the regulatory agencies would dispute it right along with me. There is a very clear tracking system which the Department, itself, has imposed that distinguishes between the country of enrichment, and the country or countries of origin of the uranium feed.

And that has existed from time immemorial, that is retained to this day. Every entry that has been looked at, every transaction that has been looked at, every piece of paper that has been looked at, shows the integrity of tracking the origin of the feed material, right down through the enrichment process, to the delivery of LEU, with a country of origin for enrichment, and a country, or countries of origin for the uranium feed.

Also with respect to country of origin, that runs over into substantial transformation. So what? We can talk about substantial transformation as long as we want.

* * * * *

[95]

* * * And like all the rest of the arguments that you've heard today, nothing but creative fiction, but fiction.

Now, let me just close with one point, which is in our reply brief, and which I hope you will focus on.

We hypothesize that instead of operating the way we do, we will actual tag and track the customer's uranium identically, the exact same thing, through the process.

We do nothing differently, except we do that. Actually, in URENCO's case we can, and do do that, with respect to reprocessed uranium.

Now, if we did all of that we would have no payment in kind possibility, we would have no fungibility question whatsoever. All we would be doing would be taking what the customer gives us, and enriching it, like polishing shoes, like a lot of other services that one could imagine.

If that were to come about, I would suggest to you, this entire edifice that has been constructed, rather creatively, on the other side, [96] just falls down and collapses.

Because by anybody's reckoning, including our wonderful dry cleaning analogy, this is a service. Now, can it really be that whether this is a service or not is affected, let alone controlled, by fungibility, by that difference?

I put it to you that that is inconceivable. And I also think, one final observation, what you are really being asked to do here, let's cut through it all, is stretch the anti-dumping law so that it creates a remedy for a service.

Now, that is an argument, if it is an argument, that ought to be presented not to the Department of Commerce, but to the Congress of the United States.

You can interpret, but you cannot make new law. You cannot provide a remedy for services, when that is not within your, that is not allowable under the statute. Congress must make that decision.

And in making that decision it must make it in the context of our international obligations, and our international negotiations * * * .

* * * * *

[141] HEARING OFFICER CARREAU: Thank you very much, everybody, for participating.

MR. CULP: I think I might be the only utility rep in the audience, here. On this issue of payment in kind, I represent Duke Power, Duke Energy. We purchase roughly ten percent of the LEU that comes into the United States, and it goes in seven nuclear power plants that we operate.

Over the course of this investigation, roughly 95 percent of the transactions that we entered into call for enrichment services contracts, they are not for EUPs. So a very small portion of the contracts that we enter into are for an EUP.

For those contracts that we negotiated, we did several of these contracts over this period of the investigation, and even prior to, that relate to enrichment services.

I can tell you that neither party, neither we as the utility, nor enrichment services providers, and that is not only USEC, but URENCO and COGEMA, under no

circumstances do any of those parties ever believed that the uranium that we supplied to be [142] enriched, as a service transaction, was a payment in kind.

We supply uranium, our own uranium, and hold title to that uranium throughout the process. We specify to the enrichers how we want that uranium to be enriched, which assays to enrich the product to, and what tails assay to apply to the services, and we receive the product back at the specifications that we provide.

MR. MASON: At this point I just want to make sure that there is a submission on the record with those facts?

MR. CULP: There is.

HEARING OFFICER CARREAU: Thank you very much, everybody.

(Whereupon, at 1:05 p.m. the above-entitled matter was concluded.)

[FOR OFFICIAL FILE]

**UNITED STATES DEPARTMENT OF COMMERCE**
**The Under Secretary for International Trade**
Washington, D.C. 20230

[NOV 7 2001]

[A-427-818, A-428-828,]
[A-421-808, A-412-820,]
[C-427-819, C-428-829,]
[C-421-809, C-412-821]
[Investigation]
[Public Document]
[Group II/Office VI: DB]

M.P. Carl
Directorate-General for Trade
European Commission
Rue de la Loi, B-1049 Bruxelles
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Dear Peter:

Thank you for your recent letter regarding the anti-dumping and countervailing duty petitions on low enriched uranium imported from France, Germany, the Netherlands, and the United Kingdom. I appreciate your expressions of sympathy in the wake of the tragic events of September 11, 2001, related in your letter and personally when we last met in Paris. As always, I look forward to our continued dialogue and cooperation.

On uranium, I recognize that the ongoing investigations raise a number of significant issues at the core of

antidumping and countervailing duty practices. I will ensure that your views will be thoroughly considered in the course of reaching a final determination in these cases. Toward that end, I wanted to respond substantively to the issues your letter raised.

Your letter first raised the possibility that the Department's antidumping and countervailing duty investigations covering Eurodif might result in "double-counting" if the margins were simply added together at the end of the process. I should begin by disposing of a procedural point—that issue was not addressed in our preliminary determinations because the respondents did not raise it on the record. That said, on the substance, my understanding of Article VI:5 of GATT 1994 is that it applies to those instances in which a WTO member imposes "anti-dumping or countervailing duties to compensate for the same situation of dumping or export subsidization." In this instance, the subsidy allegations relate to the alleged government purchase of low enriched uranium at above-market prices. Nothing in those allegations suggested that the subsidy implied in the governments' practices was contingent on exports and would not, it seems, fall within the scope of Article VI:5 literally read.

It would, in my view, be helpful to clarify how Article VI:5, if only by analogy, would or should constrain our actions in the instant case so that we could address that point in our final determinations. Indeed, respondents would be well advised to reduce the conceptual argument to specific suggestions as to how our current calculations or methodologies would result in the alleged double-counting. And, above all, they or their counsel should ensure that those suggestions are made on the

record in the proceeding, since the Department is bound by our statute and decisions of the courts to consider only those facts and legal arguments placed before us on the record in an agency proceeding.

The second point you raised suggested that we erred in initiating the cases because the United States Enrichment Corporation (USEC) provides a service, rather than producing a good, and should not, in your view, have standing to petition for relief under the dumping and countervailing duty laws. Again, I should begin with a procedural point. I understand that Faryar Shirzad, in his recent discussions with Gerard Depayre here in Washington, clarified the legal constraints on the Department's ability to address questions of standing once we initiate a case. We cannot, as a matter of law, revisit the issue of standing at this point.

I think it is nonetheless important to address the distinction you raised with respect to the nature of the processing that takes place abroad and whether what is produced constitutes a good or a service. I do so because it could prove relevant to the outcome of the case on the merits, rather than the question of standing which has already been decided. Indeed, under both U.S. law and the WTO Antidumping and Subsidies Agreements, the question of standing is confined solely to a determination whether the petitioning domestic industry produces a "like product." At the initiation stage, we provided the factual basis for our conclusion that USEC is the producer of low enriched uranium, regardless of the contractual arrangement between USEC and the utilities, by examining such factors as manufacturing operations, capital investment in production facilities, value-added processing, and employees dedicated to

manufacturing. By examining the same production-related activity of the utilities, we determined that the utilities could not be considered to be the producers of low enriched uranium, even in those arrangements where they provide the uranium feedstock to the enricher. Rather, we found that utilities are purchasers and industrial users of low enriched uranium. Your argument, in substance, runs to the separate question of what it is that enters the United States—whether it is the same good that left the United States or whether it has been subjected to sufficient processing and has been sufficiently advanced in value as to create a new and different article of commerce and confer a different country of origin for customs purposes. It strikes me that this issue is at the heart of the good v. service arguments that you put forth.

A bit of background may help explain why I reach that conclusion. An often obscured point about the nature of antidumping and countervailing duty cases, as is true of appeals from customs decisions generally, is that the cases proceed *in rem* (i.e., against the good as entered), rather than *in personam* (i.e., against the parties to the import transaction). The basis for that distinction lies in the fact that what is ultimately at issue is an assessment of duty against the goods, rather than a sanction against the parties. That distinction is particularly important here in light of the argument you raised, which implicitly raises the question of whether or not a good is entering the United States subject to duty or whether the good retains the character of a good exported from the United States which is simply being returned to our shores. Indeed, if your argument does not further that line of argument in trade terms, it is dif-

ficult to see how it would make any legal difference to the determinations in the case.

While the Department is not strictly speaking bound by the determinations of the Custom Service, they are relevant because they set the basic ground rules of trade that both European and U.S. importers and exporters must deal with and are set to provide as much certainty as possible precisely so that trade can flow. When a customs officer determines whether a duty applies, he or she must determine the classification and country of origin of the product. If the U.S. Customs officer considered the uranium in question to be of U.S. origin, it would appear to strengthen the argument that the European providers of enrichment services did nothing to advance the value of the product or otherwise create a new and different article of commerce. In other words, the Customs officer would, in effect, be determining that the processing abroad did not sufficiently alter the character of the product so as to confer French or Dutch origin, for example. That would clearly be the case if the French or Dutch firm were providing accounting, transportation, repackaging, or warehousing services.

On the other hand, if the Customs officer determines that the processing abroad does add value and does create a new and different article of commerce, that decision necessarily implies the conclusion that the processing is sufficient to confer a new country of origin. That would be true in the case of virtually everything that we would both recognize as manufacturing operations in other analogous areas, such as in metallurgy, where the finishing of a steel product might be regarded as a service, but is generally considered sufficient processing to

change the nature of the intermediate good so as to confer a different country of origin.

Indeed, if you extend the argument about goods versus services too far, you risk bending the existing trade rules beyond recognition. The weaving of yarn into cloth might be considered a mere service to the yarnmaker, despite the fact that to both the relevant industry and to customs officials the "service" involved is sufficient to confer an altogether different country of origin. You can imagine the effect on current textile and apparel arrangements if that argument were to prevail. In short, there would appear to be a sound reason for trying to reason through the argument about goods versus services to a conclusion that makes sense in trade terms given the broader implications for the trading system.

What I would suggest is that the respondents in this matter address the point expressly, rather than debating the question of standing, and provide the supporting evidence needed to sustain the underlying logic of their argument. And, I would suggest they should definitely take into account the degree to which their argument would or would not be consistent with the existing trade treatment of the processed uranium when it is processed in France and exported as a good of French origin to the United States even when that processing takes place subject to contract manufacturing between a U.S. utility and the French processor. I assure you that we will continue to examine this issue closely and will, of course, take into account in our final determinations any evidence that the respondents can provide with respect to the points your letter raises.

The third point in your letter was that our decision on the goods versus services issue seemed to conflict with the findings of the U.S. Court of Federal Claims in *Florida Power & Light Co., et al v. United States, No. 96-644-C (June 28, 2001)*. That is not legally the case, of course, because the court's decision is wholly inapposite to the determination before the Department. The claim before the court was brought under an entirely different statute, codified for different policy purposes, and involved a dispute over an entirely different matter—namely what, if any, financial liabilities the government could legally pass on to the customer. That said, it might help if respondents in the proceeding before us clarified how the court's decision should inform our judgment.

Assuming for purposes of argument that the decision may help define the nature of the contractual relations among the parties to a contract for enrichment services, the court simply did not reach the question of what bearing those contractual relationships might have on the determinations to be made by the Department. The Claims Court did not purport to define what, if any, effect the nature of the contract manufacturing relationships common in the industry would have on the nature of the product exported to the United States (i.e., whether the processing abroad was such that the uranium entering the United States amounted to nothing more than American goods returned, or instead was significant enough to result in a change of country of origin of the uranium before it was exported to the United States). What's more, closely read, the court's treatment of the issue tends to support the Department's determinations to date. The court did, after all, acknowledge that the processing resulted in a product that

was essentially different than the feedstocks that were used in the process regardless of the nature of the contractual relationships that led to the processing. That said, I will be interested to learn what respondents make out of the case and will consider carefully any arguments they are prepared to make on the basis of the Claims Court's decision.

The fourth point raised in your letter related to systemic implications of a finding suggesting that the government's purchases of goods or services from private sector sources might result in a subsidy to the seller of those services. In the abstract, there seems to be little doubt that overpayment for goods could result in a subsidy (i.e., a financial contribution by the government that results in a benefit to the recipient) in WTO terms. In every instance, a case brought on that basis will rise or fall on its facts. I assume that you are arguing by analogy to the claim that has often been raised in European circles to the effect that U.S. defense spending results in massive subsidies to the contractors employed by the Pentagon.

I should probably pause here to explain that, while in private practice, I had the opportunity to work extensively with a number of companies, both U.S. and foreign, on U.S. government contracts. Between the heavy overhead costs imposed on all government contractors simply to qualify for bidding, the recurring overhead costs that have been imposed by government regulations, and the effects of the Competition in Contracting Act and the actively used bid protest procedures, I would be very hard pressed to point to an instance where the U.S. government overpaid a contractor in any significant amount in recent years. It could be I do not

see the systemic risk in quite the same way as your letter suggests, or that I am not evaluating the risk for other U.S. programs adequately based on my limited personal experience. But, let me suggest this, I would be open to further clarification on the point, and I would certainly expect the parties to the proceeding to address those issues if they were raised on the record in the cases before us. In either event, I would look forward to further discussions with you on this point.

The last point in your letter that I can respond to on the substance relates to your concerns regarding the application of the "international consortia" provision in our statute with respect to Urenco. This is the first time that we have invoked this provision and I appreciate your thoughts on this issue. As you know, we found that, under the Treaty of Almelo, the three governments agreed to produce and sell low enriched uranium, and that each of the participating companies share research and development as well as the production and marketing of low enriched uranium. While I would agree that the fact pattern you describe is one potential scenario that might come under the rubric of the international consortia provision, our initial review of the statute and legislative history indicates that the facts in these cases also come under that provision. Parties have briefed the legal and factual basis of this preliminary decision extensively, and we will carefully review all comments prior to making any final determination.

As for the specific subsidies you identified, related to the unpaid portion of a contingent liability in the case of Germany and the unpaid portion of outstanding loans from the European Investment Bank to British Nuclear Fuels, I can only say that those determinations will flow

from the facts on the record. The financial agreements involved are complex, as I learned in previous work on behalf of clients in the energy industry. Our case analysts have only recently returned from on-site verifications, and I can only promise that we will carefully consider the verified information on the record, as well as the comments you raise and the comments raised by all other parties, prior to making a final determination.

In closing, let me reiterate my appreciation for your taking the time to reflect your comments in writing. I will make our correspondence a part of the record so that all of the parties to the proceeding can raise or rebut the points we have discussed as they deem appropriate or helpful to their respective cases, including the petitioners, the respondents, and the utilities that are a part of the contractual relationships involved here. Parties should contact the case managers if they would like to submit further argument and should do so quickly, as our statutory deadline is fast approaching. Let me also emphasize that I fully understand your responsibilities toward your companies and Member States and your need to discuss this matter in a more structured way. I appreciate the level of cooperation shown by the European companies. I understand that representatives of both our governments met recently in Geneva and had very productive discussions. I stand ready to consult at any time, and I very much appreciate the ongoing dialogue and fruitful discussions we have had on this matter.

As always, thank you for your thoughts. If you would like to discuss this, or any other matter further, please feel free to contact me at (202) 482-2867 at your convenience.

Sincerely,

/s/ [ILLEGIBLE]
GRANT D. ALDONAS

**United States International Trade Commission**
**Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom**

Investigations Nos. 701-TA-409-412 (Final)
and 731-TA-909 (Final)

Washington, DC 20436

* * * * *

**D. Domestic Industry**

Section 771(4) of the Act defines the relevant industry as "the producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes the major proportion of that product."[11] In defining the domestic industry, the Commission's general practice has been to include in the industry all of the domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market.[12] Based on our like product determination, we determine that there is a single domestic industry consisting of the sole domestic producer of LEU, USEC.[13]

Most LEU is produced pursuant to arrangements in which utilities pay the enricher in cash for the enrich-

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[11] 19 U.S.C. § 1677(4)(A).

[12] *See United States Steel Group v. United States*, 873 F. Supp, 673, 681-84 (Ct. Int'l Trade 1994), *aff'd*, 96 F.3d 1352 (Fed. Cir. 1996).

[13] We note that there is no issue in these investigations as to whether USEC should be excluded from the domestic industry pursuant to 19 U.S.C. § 1677(4)(B). USEC is neither related to an exporter or importer of subject merchandise nor is it an importer of the subject merchandise.

ment component of the LEU (measured in "separative work units" or "SWUs"), and deliver a quantity of natural $UF_6$ to the enricher equal to the amount of converted uranium deemed to be contained in the LEU. These transactions are referred to hereinafter as "SWU transactions" or "SWU sales." In addition, some LEU is sold in transactions where the customer pays an all-inclusive price for both natural $UF_6$ feedstock and the enrichment component.[14] These transactions are referred to hereinafter as "EUP transactions" or "EUP sales."

Respondents and AHUG argue that the Commission is precluded from conducting the analysis necessary for deciding whether to cumulate subject imports or for evaluating price effects, because foreign enrichers and USEC sell enrichment services and not LEU. We find these arguments unpersuasive. The statute instructs the Commission to cumulate "if such imports [of the subject merchandise] compete with each other and with domestic like products in the United States market."[15] In analyzing price effects, the Commission is instructed to "[evaluate] the effects of [the subject] merchandise on prices."[16] As noted above, Commerce has defined the subject merchandise to include all LEU entering the United States. Moreover, it is undisputed that LEU is a tangible product both when it is imported and when it is produced in the United States. Thus, contrary to Respondents' assertions, the Commission is required to make the evaluations relating to underselling and cumulation specified in the statute, as part of its injury analysis.

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[14] Confidential Report ("CR") at I-13, Public Report ("PR") at I-10.

[15] 19 U.S.C. § 1677(7)(G)(i).

[16] 19 U.S.C. § 1677(7)(C)(ii).

Respondents and AHUG have not challenged the Commission's conclusion from the preliminary phase of the investigations that USEC and not the utilities is the domestic producer of LEU. Where foreign producers win enrichment contracts, it results in subject imports of LEU that may injure the U.S. production operations of the domestic producer USEC.

* * * * *

**Response of the Ad Hoc Utilities Group to the Commerce Department's June 19, 2006 Redetermination Pursuant to Court Remand**

Second, Commerce's proposed certification does not conform to industry practice. As both this Court and the Federal Circuit were aware, the fungible nature of uranium, the complex steps involved in processing it into uranium fuel, and the sensitivity, cost, and specialized equipment involved in physically transporting nuclear materials create certain ramifications for what happens in the performance of most enrichment services contracts. First and foremost, because LEU is a fungible product that requires particular care in transport, and because delivery by the enricher to the utility is ordinarily effected by a book transfer at the utility's designated fuel fabricator, imports of LEU frequently are not allocated to specific SWU contracts or orders prior to importation—or even at the time of entry.[18] Enrichers often make bulk shipments to U.S. fabricators to satisfy a number of contractual delivery requirements or to replenish physical stocks depleted through previous or imminent book transfers. The enriched uranium in those shipments is often not allocated on a cylinder-by-cylinder basis to specific SWU contracts or orders under a specific SWU contract. Instead, rather like an intra-bank transfer from one depositor to another, the SWU ordered by the utility is book transferred into each utility's account from the enricher's account at the fabricator on the delivery dates provided in the delivery orders

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[18] *See* Final Remand Determination (June 23, 2003) at 68, JA3068; Response of USEC Inc. to the Department of Commerce's Remand Determination of June 23, 2003 (July 3, 2003) at 11-18, JA110019-110026.

under such SWU contracts.[19] The *Eurodif* decisions do not suggest that LEU imported pursuant to SWU transactions would be excluded from the antidumping duty law only if it matched up with specific orders under SWU contracts. Rather, the Federal Circuit, like this Court, focused on what was purchased and what was sold, issues unaffected by the fungibility of feed, SWU, or LEU.

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[19] *See* Opening Brief of the Ad Hoc Utilities Group in Support of Motion for Judgment upon the Agency Record (Sept. 27, 2002) at 12, JA87026.

**Comments Regarding the Department of Commerce Final Results of Redetermination Pursuant to Court Remand**

* * * * *

Respondents note, however, that the Department's proposed scope exclusion contains extraneous items that could be misconstrued as going beyond those three essential elements:

- The proposed scope exclusion states that a SWU transaction requires that the "parties only contract for the provision of enrichment processing." Use of "only" is apparently intended to distinguish situations where the parties enter into a contract for the sale of LEU, *i.e.*, one where the utility enters into a transaction where it is purchasing LEU itself, without providing uranium feed.

  Respondents note, however, that in SWU transactions, utilities sometimes also purchase conversion or fabrication services from the enricher or an affiliate; the use of the word "only" could be misconstrued as precluding the application of the scope exclusion to these transactions, even though the customer has entered into a SWU transaction and provided its feed uranium for enrichment. Similarly, as the Department has recognized, SWU transactions frequently include such additional "incidentals" as sampling, cylinder rental, and cylinder cleaning.[5] The Remand Redetermination makes clear that Commerce did not intend that the inclusion of such incidentals

[5] Remand Redetermination at 7.

would place outside the scope exclusion a transaction that otherwise would qualify as a "SWU transaction." Any potential for misconstruction of the scope exclusion can best be avoided by deleting the word "only" from this phrase. The subject sentence accurately encompasses the guidance of the courts concerning what constitutes a SWU transaction without the word "only."

- The third sentence of the proposed scope exclusion states that at "no time, before, during or after enrichment, does the enricher own or hold title to the LEU product delivered."

  Use of the word "before" in this phrase makes no sense and should be deleted—it obviously is impossible for any entity to hold title to the LEU delivered to the customer "before" enrichment of the customer's uranium has occurred, because the LEU does not yet exist. Inclusion of the word "before" appears to be inadvertent, since paragraph 5 of the Department's proposed certification defines a SWU transaction as one where "[a]t no time during or after enrichment did Enricher own the Excluded Merchandise [*i.e.*, the LEU]."

- The next sentence of the proposed scope exclusion states that a SWU transaction "must be performed in accordance with the relevant terms of a written contract for the provision of SWU."

  Read in context, it is plain that the "relevant terms" are only those contained in the second and third sentences of the proposed scope exclusion, *i.e.*, those relating to the utility's purchasing the service of enrichment, and providing the feed uranium, in a transaction where the enricher does

not hold title to the LEU. To make any other terms of the enrichment contract "relevant terms" would not only inject uncertainty into the application of the scope exclusion, but would enable Commerce to constrict the scope exclusion in a manner not contemplated or authorized by this Court or the Federal Circuit. To avoid any ambiguity, the word "foregoing" should be inserted before "relevant terms" and any certification should be explicit as to what constitutes such relevant terms, as discussed below.

We urge this Court to resolve the above ambiguities, or to require the Department to do so, in the manner suggested above.

## II. THE DEPARTMENT LACKS AUTHORITY TO ALTER THE FEDERAL CIRCUIT'S EXCLUSION OF SWU TRANSACTIONS FROM THE SCOPE OF THE LEU ORDER

In light of the Department's proposed scope exclusion that, in the main, properly implements the courts' intended definition of a SWU transaction, it is troubling that the Department suggests that it is free to alter this definition. It does so not only through repeated indications that it "respectfully disagrees" with the decisions of the Federal Circuit and this Court, but also through a claim that "Commerce may determine that it is necessary to provide additional clarification of the scope of this order to further define the meaning of 'SWU transaction' in accordance with *Eurodif I* and *II* and to modify the form of the required certification as circumstances warrant."[6]

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[6] *Id.*

The Department acknowledges this Court's holding that the arguments raised by USEC concerning the factual performance of a SWU contract were of "no moment" to whether

* * * * *

to a SWU transaction. As the Department's certification states:

> 1. On _____, 200__, Utility placed an order for the purchase of separative work units ("SWU") with Enricher. Attached are (i) copy of the order issued by Utility; (ii) the contract for enrichment processing between Utility and Enricher pursuant to which the order was issued; and, (iii) any applicable certificate of the quantity and quality (CQQ) and any applicable nuclear material accountability document (*e.g.*, DOE/NRC 741) for the LEU being imported. These documents are labeled Attachment A, B, and C, respectively.
>
> 4. The following cylinders of the Excluded Merchandise are being imported pursuant to the purchase order:
>
> | Cylinder No. | Quantity | Assay |
> |---|---|---|

But as the Department knows full well, in order to save on delivery charges, and because there are relatively few vessels authorized or available to carry LEU, enrichers often make bulk shipments, which involve shipping LEU for the needs of multiple customers who have their fuel assemblies made by the same consignee/fabricator in one batch. Such deliveries may include LEU intended for the satisfaction of more than one customer within one or more cylinders. The LEU is actu-

ally delivered to a third party, the utilities' designated fabricator, which commingles the LEU within the amounts it holds for enrichers and utilities.[29] Bulk or batch shipments minimize costs and inefficiencies of shipping partially filled cylinders as well as shipment delays and bottlenecks due to the lack of cylinders. Improper and irrelevant certification requirements should not be allowed to scuttle operational efficiencies.

The Department's linkage requirement is irrelevant to the proper certification issue, which is only whether each cylinder is entering the United States pursuant to a SWU transaction. Certification that the importation is to fulfill a SWU transaction is sufficient, just as is the existing certification regarding LEU imported by foreign utilities for processing and re-export pursuant to a straightforward certification that an equivalent quantity of LEU (less processing losses) will be re-exported within eighteen months.

The manner in which this industry operates was explained to the Department in the investigation, and reiterated to the Department in the latest round of comments just before the issuance of Remand Redetermination.[30] Further, as explained above, the fact that uranium is treated as fungible by all participants in the nuclear fuel industry was well known to the Federal Circuit, which determined that this had no effect on what was sold. Accordingly, there is no basis for the Department to require the kind of physical linkage

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[29] *See, e.g.*, Response of USEC Inc. to the Department of Commerce's Remand Determination of June 23, 2003 (July 3, 2003) ("USEC Remand Response") at 17, confirming the delivery of LEU to the customers' fabricator.

[30] *See infra* notes 31 and 32 and accompanying text.

it has proposed when it knows full well that that is not how the industry operates.

By contrast, paragraph 1 of Respondents' certification (which combines paragraphs 1 and 4 of the Department's certification) avoids these problems. Respondents proposal is the following certification language:

> 1. The following cylinders of LEU are being imported pursuant to a separative work unit ("SWU") contract(s) under while Enricher's customer(s) purchase(s) enrichment services from, and supply(ies) unenriched natural uranium to, Enricher for such enrichment ("SWU transactions"):
>
> Cylinder No. Quantity Assay

This paragraph would require the certification of the enricher that each of th cylinders being imported is entering pursuant to a SWU contract where the utility provides the uranium and pays for the service of enrichment.

* * * * *

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Nos. 07-1059 and 07-1078

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

EURODIF S.A., ET AL.

USEC, INC., ET AL., PETITIONERS

*v.*

EURODIF S.A., ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Section 1673 of Title 19 of the United States Code provides that, when "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," to the detriment of a domestic industry, the Department of Commerce (Commerce) shall impose antidumping duties on entries of the foreign merchandise. The question presented is:

Whether the court of appeals erred in rejecting Commerce's conclusion that foreign merchandise is "sold in the United States" within the meaning of 19 U.S.C. 1673 when a purchaser in the United States obtains foreign merchandise by providing monetary payments and raw materials to a foreign entity that performs a major manufacturing process in which substantial value is added to the raw materials, thereby creating a new and different article of merchandise that is delivered to the U.S. purchaser.

## PARTIES TO THE PROCEEDING

The petitioner in No. 07-1059 is the United States of America, which was the Defendant-Appellant in the court of appeals. The petitioners in No. 07-1078 are USEC Inc. and the United States Enrichment Corporation, which were Defendant-Intervenor-Appellants in the court of appeals.

Respondents who were Plaintiffs-Appellees below are Eurodif S.A., AREVA NC (formerly Compagnie Generale des Matieres Nucleaires), and AREVA NC, Inc. (formerly COGEMA, Inc.).

Respondent who was the Plaintiff-Intervenor-Appellee below is Ad Hoc Utilities Group.

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**BRIEF FOR THE UNITED STATES**

## OPINIONS BELOW

The final decision of the court of appeals (Pet. App. 1a-7a[1]) is reported at 506 F.3d 1051. The opinion of the court of appeals on interlocutory appeal (Pet. App. 8a-28a) is reported at 411 F.3d 1355, and its order denying a petition for rehearing on that appeal (Pet. App. 29a-35a) is reported at 423 F.3d 1275. The opinion of the

[1] References in this brief to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 07-1059.

Court of International Trade from which the interlocutory appeal was taken (Pet. App. 36a-68a) is reported at 281 F. Supp. 2d 1334, and its initial remand order (Pet. App. 178a-219a) is reported at 259 F. Supp. 2d 1310. The Department of Commerce's Notice announcing its preliminary determination in its antidumping investigation of low enriched uranium from France (J.A. 238-259) is reported at 66 Fed. Reg. 36,744, and its final determination (Pet. App. 220a-262a) is reported at 66 Fed. Reg. 65,877. Its decision on first remand from the Court of International Trade (Pet. App. 69a-177a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on September 21, 2007. On December 11, 2007, the Chief Justice extended the time within which to file petitions for a writ of certiorari to and including January 22, 2008. On January 14, 2008, the Chief Justice further extended the time to and including February 15, 2008, and the petitions for a writ of certiorari in No. 07-1059 and No. 07-1078 were filed on that date. The petitions were granted and the cases were consolidated on April 21, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

Section 1673 of Title 19 of the United States Code is reproduced in the appendix to this brief. App., *infra*, 1a.

## STATEMENT

1. In international trade law, the practice of exporting goods to another country to be sold at less than their fair value—*i.e.*, the price for which they are sold in the producer's home market, or their cost of production—is known as "dumping." See 19 U.S.C. 1677(34). For

almost a century, Congress has provided a remedy to domestic industry harmed by the dumping of foreign goods in the United States. See Anti-Dumping Act, 1921, ch. 14, 42 Stat. 9, repealed by Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 193; Tariff Act of 1930, Tit. VII, 19 U.S.C. 1673 *et seq.* The antidumping-duty statute provides that, when "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," 19 U.S.C. 1673(1), duties must be imposed on the merchandise in the amount of the difference between the "normal value" of the merchandise (generally the price of the good at home) and its "export price" (generally the price at which the good is sold to an unaffiliated U.S. purchaser). 19 U.S.C. 1673, 1673e(a), 1677a, 1677b. That difference is known as the "dumping margin." 19 U.S.C. 1677(35)(A).

The Department of Commerce (Commerce) has statutory responsibility for administering the antidumping-duty statute. 19 U.S.C. 1677(1). If an interested party, including a member of a domestic industry, petitions Commerce, or if Commerce independently determines that the statutory criteria are met, Commerce must undertake a formal investigation to determine whether antidumping duties should be imposed on a particular class or kind of imported merchandise. 19 U.S.C. 1673a(a) and (b). Commerce imposes antidumping duties if two independent determinations are made. First, Commerce must determine that the subject merchandise was "sold in the United States for less than its fair value," or "dumped," during a period of investigation. 19 U.S.C. 1673(1); see 19 U.S.C. 1677(1) and (34). Second, the International Trade Commission (ITC) must determine that the domestic industry was materially

injured or threatened with material injury by virtue of dumped imports. 19 U.S.C. 1673(2); see 19 U.S.C. 1677(2). If both those determinations are made, Commerce issues an antidumping-duty order directing U.S. Customs and Border Protection (Customs) to assess duties on the merchandise in an amount equal to the dumping margin. 19 U.S.C. 1673d(c)(2), 1673e(a)(1).

An interested party may challenge a final antidumping-duty determination before the Court of International Trade (CIT) pursuant to 19 U.S.C. 1516a(a)(2) and 28 U.S.C. 1581(c). Commerce's determination must be sustained unless "unsupported by substantial evidence on the [administrative] record, or otherwise not in accordance with law." 19 U.S.C. 1516a(b)(1)(B)(i).

2. This case concerns the application of the antidumping-duty statute to imports of low enriched uranium (LEU). LEU is a critical component for the production of nuclear power. It is produced by converting natural uranium—that is, mined uranium that has been milled or refined—to uranium hexafluoride gas, then subjecting the uranium hexafluoride to a process of isotope separation that increases the concentration of the fissionable isotope $U^{235}$, or "assay," to a desired level. By weight, the concentration of $U^{235}$ in natural uranium is approximately 0.711%. Most nuclear utilities require fuel with an assay between 3% and 5%. The process of increasing the concentration of $U^{235}$ is known as "enrichment." Once the uranium has been enriched, the finished LEU is fabricated into fuel rods, which are used in nuclear reactors to generate power. Pet. App. 9a, 181a-183a, 230a-231a; cf. *Huffman* v. *Western Nuclear, Inc.*, 486 U.S. 663, 665 n.2 (1988) (describing the uranium enrichment process).

The "amount of energy or effort required to separate [*i.e.*, increase the concentration of] a given quantity of feed uranium into LEU" is measured in "separative work units," or "SWUs." Pet. App. 183a. The amount of LEU that can be produced from a given quantity of feed uranium varies in proportion to the quantity of SWUs applied. The same amount of LEU can be produced by using more feed uranium and applying fewer SWUs, or by using less feed uranium and applying more SWUs. J.A. 80-81.

Utilities in the United States generally acquire LEU from uranium enrichers in one of two ways. First, utilities may enter into contracts in which they agree to pay the enricher for a specified quantity of LEU at a given assay. Such contracts are known as "enriched uranium product," or "EUP," contracts. Second, utilities may enter into contracts in which they agree to arrange for the delivery of a quantity of unenriched uranium (known as "feed") to an enricher, and pay the enricher for the number of SWUs to be applied to create LEU. Such contracts are known as "SWU" contracts. Pet. App. 182a-184a.[2] This case concerns the treatment of the latter type of contracts—SWU contracts—under the anti-dumping-duty statute.

3. a. In December 2000, petitioners USEC Inc. and United States Enrichment Company (collectively, USEC) filed with Commerce a petition alleging that LEU imports from France, as well as other European

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[2] SWU contracts became common in the uranium enrichment industry in the 1960s and 1970s, when the U.S. government "had a monopoly on enrichment services, but offered no other services relating to the production of nuclear fuel." Pet. App. 186a. Utilities accordingly purchased feed uranium from third parties to be enriched by the U.S. government. *Ibid.*

countries, were being, or were likely to be, sold in the United States at less than fair value. J.A. 39.[3] USEC is a private, for-profit corporation that has assumed enrichment operations formerly performed by the Department of Energy. See USEC Privatization Act, 42 U.S.C. 2297h *et seq.* It is now the only enricher of uranium in the United States. Pet. App. 9a. USEC alleged that, as a result of the unfair pricing of the imported LEU, the domestic enrichment industry was materially injured. Commerce commenced an investigation. *Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom*, 66 Fed. Reg. 1080 (2001) (notice of initiation of antidumping investigation).

b. At the outset of its investigation, Commerce invited interested parties to comment on the investigation's scope. 66 Fed. Reg. at 1080. Although no party disputed that LEU acquired pursuant to EUP contracts was potentially subject to antidumping duties, respondent Ad Hoc Utilities Group (AHUG), a group of utilities in the United States that purchase and utilize both imported and domestic LEU, argued that Commerce should exclude imported LEU acquired pursuant to SWU contracts from the investigation because SWU contracts "constitute the provision of services, not the production or sale of goods subject to the antidumping law." J.A. 243. Commerce preliminarily determined that, because "there is little substantive commercial difference" between EUP transactions and SWU transactions, LEU acquired pursuant to both types of contracts fell within the scope of the investigation. J.A. 245. Com-

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[3] References in this brief to "J.A." are to the Joint Appendix. References to "C.J.A." are to the Confidential Joint Appendix.

merce, however, invited further comments on the issue. J.A. 247.

c. In December 2001, Commerce issued its final determination that LEU from France was being sold, or likely to be sold, in the United States at less than fair value. Pet. App. 220a-262a. In that determination, Commerce concluded that all LEU imported from France is subject to the antidumping law, "regardless of whether the sale is structured as one of enrichment processing." *Id.* at 231a. Although the structure of the transaction may be relevant to the calculation of the duties to be imposed on the good, Commerce concluded that it "is not relevant to the issue of whether the [antidumping] law is applicable" in the first instance. *Id.* at 230a.

Commerce found that "the enrichment of uranium accounts for approximately 60 percent of the value of the LEU entering the United States," and that "enrichment processing adds substantial value to the natural uranium and creates a new and different article of commerce." Pet. App. 238a-239a. Commerce explained that "it is the enricher who creates the essential character of the LEU. The enrichment process is not merely a finishing or completion operation, but is instead the most significant manufacturing operation involved in the production of LEU," and "creat[es] a clearly distinct product from uranium feedstock." *Id.* at 251a. Having found that "the enrichment process is a major manufacturing operation for the production of LEU" that results in "substantial transformation of the uranium feedstock," Commerce concluded that "the LEU enriched in and exported from Germany, the Netherlands, the United Kingdom and France is a product of those respective countries," and, when delivered to a U.S. customer at

less than its fair value, is subject to the antidumping law. *Id.* at 229a-230a.

Commerce rejected arguments that the antidumping-duty law does not apply to LEU produced pursuant to SWU contracts because enrichers do not sell merchandise, but rather sell enrichment "services." Pet. App. 228a, 230a. Noting that "enrichment services" are a "component of LEU," *id.* at 228a, Commerce concluded that, rather than merely paying for a "service[]," utilities that acquire LEU pursuant to SWU contracts also purchase merchandise, *id.* at 231a.

Commerce explained that enrichment processing is not merely a "'service' in the same sense that activities such as accounting, banking, insurance, transportation and legal counsel are considered by the international trading community to be services," because enrichment is "a major manufacturing operation" that "result[s] in subject merchandise being introduced into the commerce of the United States." Pet. App. 231a, 239a-240a. Commerce concluded that, although it is always possible to contract separately for the purchase of raw materials and manufacturing "services," when a "purchaser has contracted out for a major production process that adds significant value to the input and that results in the substantial transformation of the input product into an entirely different manufactured product," it has purchased the finished product. *Ibid.* Commerce also found it significant that enrichers do not use the specific feedstock furnished by a utility to produce LEU for that utility, and that enrichers, not the utilities, control the production process. *Id.* at 227a, 247a.

Commerce found further support for its conclusion in the purposes underlying the antidumping-duty statute. It explained:

> [T]he unfair trade laws must be applicable to merchandise produced through contract manufacturing, just as they are applicable to merchandise manufactured by a single entity. To do otherwise would contravene the intent of Congress by undermining the effectiveness of the [antidumping] laws, which are designed to address practices of unfair trade in goods, as well as have profound implications for the international trading system as a whole. To the extent that contract manufacturing can be used to convert trade in goods into trade in so-called "manufacturing services," the fundamental distinctions between goods and services would be eliminated, thereby exposing industries to injury by unfair trade practices without the remedy of the [trade] laws.

Pet. App. 239a.

Commerce further rejected arguments that the regulation then in force concerning the treatment of entities engaged in so-called "tolling" (*i.e.*, subcontracting) operations precluded application of antidumping duties to imported LEU obtained through SWU transactions. That regulation, which has recently been withdrawn, provided that Commerce will "not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise." 19 C.F.R. 351.401(h) (2007), withdrawn by 73 Fed. Reg. 16,517 (2008). In its determination, Commerce explained that the regulation was not "relevant or applicable in determining whether merchandise entering the United States is subject to" the antidumping-duty. Pet. App. 235a. Rather, Commerce explained, Section 351.401(h) was a subsection of a regula-

tion that "was intended to 'establish certain general rules that apply to the calculation of export price, constructed export price and normal value,' and not for purposes of determining whether the [antidumping or other trade] laws are applicable" in the first instance. *Ibid.* (quoting 19 C.F.R. 351.401(a)). Commerce acknowledged that it had previously applied the tolling regulation to classify a subsequent sale of the merchandise by a tollee or contractor (*i.e.*, the entity obtaining the tolled merchandise from the toller or subcontractor), rather than the sale made by the toller or subcontractor, as the "relevant sale" for purposes of calculating the dumping margin. Pet. App. 235a. But the agency noted that it had "never applied, nor relied upon, section 351.401(h) to exempt merchandise from [antidumping] proceedings." *Ibid.*

Against this background, Commerce found that enrichers make a "relevant sale" for purposes of calculating the dumping margin, regardless of the structure of the transaction. Pet. App. 250a-251a. Commerce found that the object of a SWU contract, like the object of an EUP contract, is for "an exact amount of LEU to be delivered [by the enricher to the utility] over the life of the contract." *Id.* at 253a. "And it is this bottom line (*i.e.*, a precise amount of LEU delivered over the life of the contract) that forms the fundamental nature of the agreement between buyer and seller in a SWU contract." *Ibid.* Accordingly, Commerce concluded that "the contracts designated as SWU contracts are functionally equivalent to those designated as EUP transactions," and that "the overall arrangement under both types of contracts is, in effect, an arrangement for the purchase and sale of LEU." *Id.* at 254a, 255a.

In particular, Commerce noted that, under both types of transactions, "utility customers are not concerned with how LEU is produced or the amount of work expended (SWU) to produce such LEU. Instead, utility customers are interested in obtaining a specific quantity of a standardized product at a specified product assay." Pet. App. 255a. "[U]nder both types of contracts, * * * the enricher ultimately determines how much uranium feed is used, [and] the amount of SWU actually applied," among other aspects of the production process. *Id.* at 256a. Moreover, Commerce noted, "for both types of contracts[,] ownership of the LEU is only transferred to the utility customer upon delivery of the LEU. Consistent with this provision, for both types of transactions, the enricher incurs the risk of loss with respect to the LEU." *Ibid.*

Finally, Commerce explained, "the enrichment companies engage in the most significant portion of the production of LEU, and thus the value of enrichment is beyond question the most significant element of value in determining the price of LEU." Pet. App. 256a-257a. Commerce accordingly determined that "the pricing behavior of the enrichment companies in these transactions is relevant to the Department's determination." *Id.* at 257a. To isolate the enrichers' pricing behavior, Commerce calculated the dumping margin by comparing the value of the complete LEU product acquired by U.S. customers via SWU contracts with the normal value of LEU, using the same value for the natural uranium component of LEU "on both sides of the equation." *Ibid.* Thus controlling for the cost of raw materials in SWU transactions, Commerce determined that LEU from

France was being sold in the United States at less than its fair value. *Ibid.*[4]

d. In February 2002, the ITC determined that imports of LEU from France at less than fair value had a significant negative effect on USEC, the only domestic producer of LEU. The ITC accordingly determined that an industry in the United States was materially injured by imports of LEU from France at less than fair value. See U.S. Int'l Trade Comm'n, *Pub. No. 3486, Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom* (2002) <http://hotdocs.usitc.gov/docs/pubs/701_731/pub3486.pdf> (determination and views of the Commission). Shortly thereafter, Commerce issued an order imposing antidumping duties on LEU from France. *Low Enriched Uranium from France*, 67 Fed. Reg. 6680 (Dep't of Commerce 2002) (notice of amended final determination of sales at less than fair value and antidumping-duty order).

4. a. Respondent Eurodif, S.A., a French enricher of uranium, challenged Commerce's final determination, along with its owner, respondent Compagnie General des Matieres Nucleaires (now AREVA NC), and its U.S. subsidiary, respondent COGEMA, Inc. (now AREVA NC, Inc.). The CIT remanded the matter to Commerce for further explanation, focusing upon Commerce's determination that its tolling regulation did not apply to SWU transactions. Pet. App. 178a-219a. Although the CIT acknowledged that the tolling regulation does not

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[4] In a separate determination, Commerce concluded that LEU from the United Kingdom, Germany, and the Netherlands, was not being sold or likely to be sold at less than fair value. *Low Enriched Uranium from the United Kingdom, Germany, and the Netherlands*, 66 Fed. Reg. 65,886 (2001) (notice of final determination of sales at not less than fair value).

"exempt merchandise from [antidumping] proceedings," the court concluded that the regulation is nevertheless relevant because "a determination that the enricher provides a tolling service would mean that the price charged by the enricher to the utility for the enrichment cannot form the basis of the export price for the purpose of determining dumping margins." *Id.* at 206a (citation omitted). The CIT determined that the circumstances of this case resembled previous cases in which Commerce had examined tolling arrangements providing for a tollee to furnish raw materials to a toller, which in turn produced and delivered a finished product to the tollee. *Id.* at 197a. Noting that Commerce had determined in those cases that the tolling transaction is not a "relevant sale" for purposes of calculating the dumping margin, *id.* at 190a-192a & n.9, the court ruled that Commerce's decision not to apply the tolling regulation in this case "require[d] a more persuasive explanation than provided in the agency's determinations." *Id.* at 207a.

b. In its determination on remand, Pet. App. 69a-177a, Commerce provided further explanation of its conclusion that the tolling regulation did not apply to SWU transactions. The agency explained that the regulation did not apply because, *inter alia*, "the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value." *Id.* at 126a. And it further explained that SWU transactions are "sales" as the Federal Circuit had defined the term in *NSK Ltd.* v. *United States*, 115 F.3d 965 (Fed. Cir. 1997), in which it held that the term "requires both a transfer of ownership to an unrelated party and consideration." Pet. App. 134a (quoting *NSK Ltd.*, 115 F.3d at 975). Commerce determined that SWU transactions qualify as "sales" under that definition because, among

other things, "these sales represent the transfer of ownership in the complete LEU product for consideration." *Id.* at 131a.

Specifically, "[b]ased upon the contracts and other evidence of record," Pet. App. 131a, Commerce found that "[t]he enrichers transfer ownership of, and title to, the LEU to the utilities upon delivery of the merchandise for consideration." *Ibid.* By contrast, "utility customers hold title to the natural uranium feedstock that they provide to the enrichers," and it is only "[a]t the time of delivery" that "title to the LEU is transferred to the customer, and [the customer's] title to the feed material is extinguished." *Id.* at 132a. Moreover, Commerce explained, because the enricher treats natural uranium feedstock as fungible, before delivery of LEU "[t]he customer does not hold title to the LEU, nor does she hold title to the feed material contained within the recently produced LEU," because the "LEU produced by the enricher cannot be identified as having been derived from the feedstock provided by any particular customer." *Id.* at 133a. Indeed, Commerce found that "LEU delivered to a utility customer by an enricher under an enrichment contract may be produced *before* any natural uranium supplied by that customer could have been part of the production process for that LEU," thereby making it "impossible to conclude that the LEU produced and delivered by the enricher is in any way derived from the uranium supplied by the customer." *Ibid.* (emphasis added).

Based upon those findings, Commerce concluded that, "between the time in which the LEU is produced and the time in which it is delivered as specified under the contract, the enricher holds title and holds ownership in the complete LEU product." Pet. App. 133a.

Commerce further found "that enrichers make a * * * sale when they transfer ownership of the complete LEU to the utilities through the delivery of such merchandise for consideration." *Id.* at 134a (citing *NSK Ltd.*, 115 F.3d at 973 (Fed. Cir. 1997)); see *NSK Ltd.*, 115 F.3d at 975.

c. The CIT reversed. Pet. App. 36a-68a. The court rejected Commerce's conclusion that enrichers obtain ownership of LEU enriched under SWU contracts, reasoning that "although the enrichers obtain the right to use and possess the feedstock, and assume the risk of loss or damage, there is no evidence that they ever obtain ownership of either the feed uranium or the final enriched product." *Id.* at 44a. The court therefore held that the transfer of LEU from the enricher to the utility cannot constitute a relevant "sale," *id.* at 45a (citing *NSK Ltd.*, 115 F.3d at 975), and that Commerce's contrary determination was neither supported by substantial evidence nor in accordance with law, *id.* at 46a. The court certified the question for interlocutory appeal under 28 U.S.C. 1292(d). 27 Ct. Int'l Trade 1925 (2003).[5]

4. a. The court of appeals affirmed. Pet. App. 8a-28a. Without addressing the question of "relevant sales" under the tolling regulation, the court held that LEU acquired pursuant to SWU transactions is not "merchandise * * * sold" within the meaning of Section 1673, and thus is not subject to antidumping duties, however calculated. *Id.* at 17a-24a.

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[5] The CIT rejected Commerce's determination that the tolling provision is altogether inapplicable in this case, Pet. App. 50a-56a, but held that Commerce acted reasonably in declining to apply the tolling provision in determining the members of the affected domestic industry, *id.* at 56a-59a.

The court of appeals reasoned that Section 1673 covers "the sale of goods (or 'merchandise')," but not "[t]he provision of services." Pet. App. 17a. The court concluded that, because SWU contracts are contracts for the provision of services, not for the sale of goods, LEU that enters the United States pursuant to SWU contracts is not "merchandise * * * sold" within the meaning of 19 U.S.C. 1673(1). *Id.* at 17-24a.

In reviewing the contracts, the court of appeals agreed with the CIT's conclusion that "the SWU contracts do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU." Pet. App. 20a. It thus agreed with the CIT that, under the transfer-of-ownership definition of "sale" set out in *NSK Ltd.*, SWU transactions cannot be said to constitute "sales" of merchandise for purposes of the antidumping-duty statute. *Ibid.* The court also found support for its conclusion in its earlier decision in *Florida Power & Light Co.* v. *United States*, 307 F.3d 1364 (Fed. Cir. 2002). Pet. App. 20a-24a. In that case, the Federal Circuit had held that, although SWU contracts do not clearly constitute either contracts for services or contracts for goods—because they do "not fall neatly" into either category—they are "best characterized" as service contracts for purposes of the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* *Florida Power & Light Co.*, 307 F.3d at 1373.

b. While the government's petition for rehearing was pending, this Court issued its decision in *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), which held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to * * * deference only if the prior court decision holds that its construction

follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982. The government brought the *Brand X* decision to the attention of the court of appeals, explaining that the court's reliance upon *Florida Power & Light Co.* was inconsistent with the principles of agency deference that the Court reaffirmed in *Brand X*. In an order denying rehearing, Pet. App. 29a-35a, the court rejected that argument, stating that it had not considered itself "bound" by *Florida Power & Light Co.*, but had treated it only as "'persuasive' authority" in holding that SWU contracts are contracts for services, not for the sale of goods. *Id.* at 32a. The court further held that Commerce's construction of Section 1673 did not, in any event, warrant deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), because "the antidumping duty statute unambiguously applies to the sale of goods," and not "contracts for services." Pet. App. 31a, 33a.

Notwithstanding its previous acknowledgment that certain SWU contracts did "not fall neatly" into either the goods or services category, *Florida Power & Light Co.*, 307 F.3d at 1373, the court of appeals now found that "it is clear that [the SWU] contracts are contracts for services and not goods," Pet. App. 33a. The court based that conclusion upon "the critical importance" of what it characterized as "the indisputable fact that, pursuant to the contracts at issue in this case, enrichers never obtain ownership of either the feed (unenriched) uranium during enrichment or the final low enriched uranium ('LEU') product." *Ibid.* In the court's view, "the inescapable conclusion flowing from this circumstance is that the enrichers do not 'sell' LEU to utilities

pursuant to the SWU contracts at issue in this case." *Id.* at 33a-34a.

6. On remand, the CIT determined that the court of appeals' decision required Commerce to rewrite the scope of its antidumping order with respect to future LEU entries, as well as to exclude past LEU entries covered by SWU contracts from its duty calculations. 431 F. Supp. 2d 1351, 1354-1355 (2006) (per curiam); 442 F. Supp. 2d 1367 (2006) (per curiam). Although the government complied, under protest, with the CIT's order with respect to past entries of LEU, it appealed the CIT's conclusion with respect to future entries. See Gov't C.A. Br. in Nos. 07-1005 & 07-1006, at 3. The court of appeals found those issues not ripe for review and dismissed the appeal. Pet. App. 1a-7a.

## SUMMARY OF ARGUMENT

The Department of Commerce reasonably concluded that the antidumping remedy is available when utilities in the United States acquire imported, foreign-produced LEU for less than its fair value, and that the remedy does not become unavailable simply because the parties structure the transaction as separate purchases of raw materials and of essential manufacturing processes, rather than as a one-step exchange of cash for finished product. That conclusion is consistent with the text of the statute and its context. In addition, as Commerce determined, a contrary conclusion would not only be inconsistent with the remedial purposes of the statute, but would also open a loophole that would encourage widespread evasion of the unfair trade laws. Under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), the agency's statutory interpretation is reasonable and should be upheld.

A. As the "administering authority" under the antidumping-duty statute, 19 U.S.C. 1677(1), Commerce is charged with investigating and adjudicating allegations that foreign goods are being dumped in the United States. The scope of Commerce's authority under the antidumping-duty law establishes that Congress intended Commerce to speak with the force of law on the meaning of the statute. Commerce's reasonable interpretation of the statute therefore warrants *Chevron* deference, and must be sustained unless unambiguously foreclosed by the text of the statute.

B. Commerce in this case reasonably determined that imported LEU produced pursuant to SWU contracts, like any imported good produced pursuant to similar contract-manufacturing arrangements, is subject to antidumping duties if it is acquired for less than its fair value. Under the statute, if an item manufactured abroad is delivered to a customer in the United States in exchange for monetary or other consideration, that merchandise has been "sold" in the United States, and therefore is subject to the antidumping-duty statute. The structure of the underlying transaction does not change that result.

Nothing in the statute's reference to sales of merchandise unambiguously forecloses Commerce's interpretation. The statute does not ask whether a particular contract between a foreign manufacturer and a U.S. purchaser is better characterized as a contract for the sale of goods or a contract for the "service" of manufacturing goods; it asks whether the goods are being, or are likely to be, "sold" in the United States at less than their fair value. This Court's cases have recognized that statutory references to "sales" of particular commodities may encompass various transactions that result in the delivery

of the commodity for a price, and that administrative agencies are entitled to disregard the form of the transaction where necessary to effectuate the policies of the statute. In this case, statutory context confirms that Congress did not intend Section 1673's reference to "merchandise * * * sold" to have a narrower scope.

Commerce's decision not to treat imported merchandise produced via contract-manufacturing arrangements as beyond the reach of the antidumping-duty statute advances the purpose of the statute: to remedy the harm to domestic manufacturing industry that results from unfairly priced foreign products. That harm is not lessened in the case of contract-manufactured goods. Regardless of the structure of the transaction, if a domestic purchaser acquires foreign merchandise at less than its fair value, the harm to the integrity of the domestic market and the viability of domestic industry is the same.

Commerce's decision also prevents circumvention of the unfair trade laws. Domestic sales of virtually all manufactured merchandise could be structured as separate purchases of raw materials and manufacturing "services," in the same manner as SWU transactions. A rule that treated the structure of contract-manufacturing arrangements as dispositive would naturally encourage foreign manufacturers and their domestic customers to restructure their transactions to avoid imposition of antidumping duties.

The prospect of such evasion is a matter of particular concern in the sensitive context of trade in enriched uranium. The effective implementation of the antidumping-duty statute in that context is a matter of considerable importance to U.S. national security and foreign policy interests, and, in particular, serves as the foundation for

a key element of the Nation's nuclear nonproliferation policy. The courts should be particularly reluctant to second-guess the agency's judgment on the proper implementation of the antidumping law in this context.

C. Even if Commerce were not entitled to conclude that purchases of imported, contract-manufactured goods categorically fall within reach of the antidumping-duty statute, Commerce identified several salient features of the specific contract-manufacturing arrangements at issue in this case that make it particularly clear that LEU acquired pursuant to SWU transactions may properly be said to have been "sold" within the meaning of Section 1673. Most critically, although SWU contracts operate based on a legal fiction that the enricher merely performs the "service" of enriching a customer's feed uranium, the fiction is just that: enrichers treat feedstock as fungible, and although utilities retain title to the quantity of feedstock they supplied to the enricher throughout the enrichment process, they do not obtain title to the LEU for which they had contracted immediately upon production of the LEU. The result is that a utility that started out with title to a particular lot of raw materials ends up with title to a different lot of finished merchandise. As Commerce reasonably determined, the overall arrangement is one for the transfer of ownership of the finished LEU product for consideration in the form of raw materials and cash. Such an arrangement is reasonably regarded as a "sale" of "merchandise."

The court of appeals erred in concluding that, despite the fact that customers do not obtain title to the finished LEU upon production, and despite the fact that the finished LEU bears no necessary relationship to any raw materials provided by the customer, LEU produced pur-

suant to SWU transactions is unambiguously exempt from antidumping duties because the contracts do not evidence the parties' intention to vest ownership of raw materials or of the finished product in the enricher. That conclusion directly contradicts Commerce's reasonable determination that, when title passes *to* the customer, it passes *from* the enricher. But in any event, the question of contractual vesting of title in the enricher is beside the point; the statute, which uses the word "sold" in the passive, is concerned with the ultimate disposition of merchandise that enters the commerce of the United States. It is not concerned with the parties' private documents or contractual intentions with respect to the manufacturer's ownership rights.

## ARGUMENT

### THE DEPARTMENT OF COMMERCE REASONABLY DETERMINED THAT IMPORTED LOW ENRICHED URANIUM PRODUCED THROUGH SEPARATIVE WORK UNIT CONTRACTS IS SUBJECT TO ANTIDUMPING DUTIES

This Court has long held that courts are to accord deference to "reasonable interpretation[s]" of a statute adopted by the agency that has been "charged with responsibility for administering the provision." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 844, 865 (1984). The treatment of imported LEU purchased pursuant to SWU transactions under the antidumping-duty statute is an issue as to which the statute is silent, and which implicates U.S. national security and foreign policy interests that the Executive, rather than the Judiciary, is in the best position to assess. Under *Chevron*, Commerce's final determination that such LEU transactions

are subject to the antidumping-duty statute is reasonable and therefore should be upheld.

### A. Commerce's Interpretation Of The Antidumping-Duty Statute Is Entitled To Deference

In *Chevron*, this Court explained that the "power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (quoting *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)). The Court accordingly held that, while courts "must give effect to the unambiguously expressed intent of Congress" if "Congress has directly spoken to the precise question at issue," courts must defer to the responsible agency's interpretation of the statute if "the statute is silent or ambiguous with respect to the specific issue" and the agency has acted reasonably in filling the statutory gap. *Id.* at 842-843.

It is undisputed that the antidumping-duty statute does not directly speak to the precise question at issue —*i.e.*, whether the statute exempts goods that U.S. consumers acquire through contract-manufacturing arrangements, and that enter the United States at less than fair value. As a result, this case turns on the application of *Chevron*'s second step, and the deference principles articulated in *Chevron* are fully applicable in this case.

Congress has conferred on Commerce the power to administer the antidumping-duty statute. 19 U.S.C. 1677(1). Commerce is statutorily responsible for investigating allegations that imported merchandise is being, or is likely to be, dumped in the United States; for making final determinations regarding sales at less than fair

value; and ultimately for issuing orders imposing antidumping duties to remedy such unfair trade practices. 19 U.S.C. 1673(1), 1673a(a)(1), 1673d(a)(1) and (c)(2), 1673e(a)(1).

As the Federal Circuit has recognized, "[a]ntidumping investigations are complex and complicated matters in which Commerce has particular expertise," *Pesquera Mares Australes Ltda.* v. *United States*, 266 F.3d 1372, 1379 (2001) (quoting *Thai Pineapple Pub. Co.* v. *United States*, 187 F.3d 1362, 1367 (Fed. Cir. 1999), cert. denied, 529 U.S. 1097 (2000)), and are "fairly characterized as 'relatively formal administrative procedure[s]' that adjudicate parties' rights," *id.* at 1381 (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001)). Commerce's "decisions are, moreover, self-executing (that is, binding without the need for judicial enforcement), another indication of *Chevron* entitlement." *Id.* at 1382. When an interested party seeks judicial review, the court reviews Commerce's factual findings under a deferential "substantial evidence" standard, which requires a court to uphold an agency's findings unless no reasonable factfinder could agree with them. 19 U.S.C. 1516a(b)(1)(B)(i); *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1, 484 (1992); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1951).

The scope of Commerce's authority under the antidumping-duty statute makes clear that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *Mead*, 533 U.S. at 229. Commerce's construction of the statute, articulated in the course of formal antidumping proceedings, is entitled to *Chevron* deference. See *ibid.*

### B. Commerce Reasonably Concluded That The Antidumping-Duty Statute Applies To Imports Of Merchandise Produced Through Contract Manufacturing

As discussed above, Commerce began its analysis in this case by observing that the enrichment of uranium, though often referred to as a "service," Pet. App. 239a, is not "a 'service' in the same sense that activities such as accounting, banking, insurance, transportation, and legal counsel are considered by the international trading community to be services," *id.* at 240a—or in the same sense that, for example, the "cleaning of a suit" is a "service," *id.* at 230a. Rather, Commerce found, uranium enrichment is a "major manufacturing operation," *id.* at 229a, that results in the "substantial transformation" of unenriched uranium to "create[] a new and different article of commerce," *id.* at 239a-240a. Whereas, "[i]n the case of cleaning services, the cleaner merely returns to its customer a cleaned suit," in the case of uranium enrichment pursuant to SWU contracts, the enricher delivers to the customer an item of commerce that is "a clearly distinct product" from any raw materials that had been delivered to the enricher. *Id.* at 230a-231a, 239a, 251a.

In Commerce's considered view, a U.S. customer's acquisition of finished merchandise from a foreign manufacturer in exchange for payment constitutes a "sale" of "foreign merchandise" under Section 1673, regardless of whether, under the particular form of the contract, the U.S. customer purchased the merchandise in a single transaction, with a single price term covering all elements of the value of the merchandise, or separately purchased raw materials and a manufacturing process that transforms the materials into the desired merchan-

dise. Commerce determined that, for purposes of the antidumping-duty law, the structure and form of the transaction is less important than its substance. Pet. App. 240a. In a so-called "contract-manufacturing" transaction, as in a familiar one-step exchange of cash for the finished product, the overall arrangement is dedicated to the delivery of the finished product, and thus is, "in effect, an arrangement for the purchase and sale" of merchandise. *Id.* at 254a. That conclusion reflects a permissible interpretation of the statutory text, and a reasonable policy choice that effectuates the purposes of the law. Under *Chevron*, Commerce's determination should have been upheld.

***1. Commerce's interpretation reflects a permissible reading of the statute's text***

Commerce's interpretation satisfies the first step of the *Chevron* analysis: it reflects a permissible reading of the statutory text.

a. In holding that Commerce's reading of the statute was unambiguously foreclosed by the text of Section 1673, the court of appeals reasoned that Section 1673 unambiguously "applies to the sale of goods" and not "contracts for services." Pet. App. 33a. The unstated assumption underlying that decision is that the determination whether "merchandise" is "sold" for purposes of Section 1673 is limited to an examination of the terms of the contract between the manufacturer and purchaser to determine whether the monetary payment term is written as covering the entire value of the finished product, or only the value of the "service" of producing that product. See *id.* at 23a-24a (citing *Florida Power & Light Co.* v. *United States*, 307 F.3d 1364, 1373-1374 (Fed. Cir. 2002)). The consequence of that approach is that, if the

parties do not provide for the purchase of all of the components of the finished merchandise in a single contract, but instead structure the transaction as separate purchases of raw materials and manufacturing "services," then the finished merchandise is immune from the antidumping-duty statute. That is true even though the parties to the contract-manufacturing arrangement, as well as the domestic industry, are effectively in the same position in which they would be had the transaction been structured as a single-step sale of finished merchandise: The domestic entity has acquired merchandise from abroad at below its fair value, and domestic competitors of the foreign producer have lost their fair chance to compete.

Nothing in Section 1673 unambiguously limits the reach of the antidumping-duty law to foreign merchandise acquired via a single-step exchange of cash for finished product. Nor does the text of the statute unambiguously exclude goods acquired through contracts that provide in part for the "service" of manufacturing. Unlike, for example, the statute at issue in the Federal Circuit's prior decision in *Florida Power & Light Co.*, *supra*, which explicitly called for an inquiry into whether a SWU contract qualified as a "contract * * * for * * * the disposal of personal property," Contract Disputes Act of 1978, 41 U.S.C. 602(a), Section 1673 contains no such mandate. See *Florida Power & Light Co.*, 307 F.3d at 1373-1374. Indeed, the word "contract" does not appear anywhere in the provision. The words that do appear— and, in particular, the statutory reference to "merchandise * * * sold"—are capable of bearing the meaning Commerce assigned them.

In ordinary usage, the verb "sell," when used in connection with real or personal property, refers broadly to

the act of giving up, transferring, exchanging, or disposing of property for consideration. See *Webster's Third New International Dictionary of the English Language* 2061 (1993) (defining "sell" as "to give up (property) to another for money or other valuable consideration: hand over or transfer title to (as goods or real estate) for a price"); *Webster's New International Dictionary of the English Language* 2272 (2d ed. 1958) (defining "sell" as "[t]o transfer (property) for a consideration; to transfer the absolute or general title to (anything, as lands, goods, choses in action) to another for a price, or sum of money; to give up for a valuable consideration; to dispose of in return for something; to convey"); *The American Heritage Dictionary of the English Language* 1177 (1976) (defining "sell" as "[t]o exchange or deliver for money or its equivalent"); *The Random House Dictionary of the English Language* 1296 (1966) (defining "sell" as "to give up or make over to another for a consideration; dispose of to a purchaser for a price"). Section 1673 uses the verb "to sell" in the passive voice. It thus refers to merchandise that has been given up, transferred, delivered, or disposed of to another, for consideration.

A reasonable reading of the statute is that, when a foreign manufacturer delivers a newly produced good to a customer in the United States for monetary or other valuable consideration, that good is "sold" within the meaning of Section 1673 and thus potentially subject to antidumping duties. Commerce's reading of the statutory language to cover goods produced by contract manufacturing is consistent with the way other statutory references to the "sale" of particular commodities have been interpreted. This Court's cases have recognized that such references may encompass various transac-

tions that result in the delivery of the commodity to a purchaser for a price, and that administrative agencies are entitled to disregard the form of the transaction where necessary to carry out the relevant statutory scheme. In *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965), for example, the Court held that sales of leases of land containing gas reserves constitute "'sales' of natural gas in interstate commerce" for purposes of establishing Federal Power Commission jurisdiction under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, reasoning that "[a] regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law." 381 U.S. at 400.

*United Gas Improvement Co.*, in turn, cited *Gray* v. *Powell*, 314 U.S. 402 (1941), in which the Court held that a "sale or delivery or offer of sale" of coal occurred, for purposes of the Bituminous Coal Act of 1937, 15 U.S.C. 828 *et seq.* (1940) (expired 1943, repealed 1966), where owners of land with established mining facilities leased the land, including mineral rights, to a large coal consumer; the landowners leased the mining facilities to a contractor selected by the consumer; and the contractor operated the mine under contract with the consumer. See *Gray*, 314 U.S. at 407-409; see also *United Gas Improvement Co.*, 381 U.S. at 400-401. Noting that the effect of that series of transactions was to deliver to the consumer the entire output of the coal mine, the Court rejected the argument that there was no "sale or delivery or offer for sale" because title to the coal never passed. *Gray*, 314 U.S. at 416. The Court concluded that the statute did not require a transfer of title "in the technical sense," and that to interpret the statute to contain such a requirement would hamper the statute's purposes. *Id.* at 414-417.

Nothing in Section 1673's reference to "merchandise * * * sold" precludes a similarly flexible interpretation that focuses on the substance, rather than the form or structure, of a transaction, to effectuate the purposes of the antidumping-duty statute.

b. Context confirms that the antidumping-duty statute does not unambiguously exempt contract-manufactured goods that enter the United States at less than fair value. See, *e.g.*, *Zuni Pub. Sch. Dist. No. 89* v. *Department of Educ.*, 127 S. Ct. 1534, 1546 (2007) ("[S]tatutory ambiguity is a creature not just of definitional possibilities but also of statutory context.") (internal quotation marks, citation, and brackets omitted). As an initial matter, the statute refers not only to merchandise that "is being * * * sold" but also merchandise that is "*likely* to be[] sold" at less than its fair value. 19 U.S.C. 1673(1) (emphasis added). In making an antidumping determination on the basis of "likely" sales, it may well be impossible to know in advance the form that the transaction will take, or the precise contractual terms between the producer and the consumer. It is implausible that Congress intended for the application of the antidumping-duty statute to "likely" sales of merchandise to turn on matters that are unknowable in advance of the consummation of the transaction.

Moreover, as amended in 1984, the antidumping-duty statute provides that the "reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of merchandise." 19 U.S.C. 1673. Enacted as part of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 602(b)(2), 98 Stat. 3024, that provision was "intended to clarify the applicability of [the unfair trade] laws to sham leases or leases which are

tantamount to sales." H.R. Rep. No. 725, 98th Cong., 2d Sess. 11 (1984). As the staff of the Senate Committee on Finance explained: "Import transactions may be structured in a variety of ways that may not be denominated as sales but are in fact permanent exchanges for valuable consideration. This section would ensure that these unfair trade practice laws are not avoided on the basis of form alone." Staff of Senate Comm. on Finance, 98th Cong., 2d Sess., *S. Prt. No. 98-219, Omnibus Tariff and Trade Measures: Explanation of Provisions Approved by the Committee on July 31, 1984, To Be Offered as a Committee Amendment to H.R. 3398*, at 22-23 (Comm. Print 1984).

Congress later enacted a provision setting out guidance regarding the application of the lease-sale provision of Section 1673. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1327, 102 Stat. 1204 (19 U.S.C. 1677(19)). That provision directs Commerce to consider a number of factors in applying the lease-sale provision, "including whether the lease transaction would permit avoidance of antidumping or countervailing duties." 19 U.S.C. 1677(19)(F). The House Conference Report explained that, "[i]n applying the provision, it is intended that Commerce and the ITC focus on commercial realities and the substance of the transaction, rather than its form," and that "[t]he scope of the term 'sale' should be broad enough to cover a wide variety of transactional arrangements." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 615-616 (1988).

Although the statute's lease-sale provision does not answer the precise question in this case, its text and history confirm that it was reasonable for Commerce to interpret the statutory reference to sales of foreign merchandise in a manner that focuses on "commercial reali-

ties and the substance of the transaction, rather than its form," H.R. Conf. Rep. No. 576, *supra*, at 616. It would be odd indeed if a statute that explicitly provides that merchandise that is *leased* to a customer may be considered to have been "sold," and thus subject to antidumping duties, were read *unambiguously* to exempt imported merchandise as to which the customer obtains permanent dominion, merely because the customer divided the acquisition of the merchandise into two transactions.

***2. Commerce's interpretation effectuates the purposes of the antidumping-duty statute***

Commerce's decision that merchandise produced by contract manufacturing falls within the reach of the antidumping-duty statute constitutes "a reasonable policy choice" at the second step of the *Chevron* analysis. 467 U.S. at 845.

a. The basic purpose of the antidumping-duty statute is to prevent or remedy injury to domestic industry harmed by, or threatened with harm by, unfair foreign competition. When Congress enacted the first version of the antidumping-duty law in 1921, Anti-Dumping Act, 1921 (1921 Act), ch. 14, 42 Stat. 9, it did so to "protect[] our industries and our labor against a now common species of commercial warfare of dumping goods on our markets at less than cost or home value if necessary until our industries are destroyed," H.R. Rep. No. 1, 67th Cong., 1st Sess. 23 (1921). When, in 1979, Congress repealed the 1921 Act, and reenacted the law as Title VII of the Tariff Act of 1930, see Trade Agreements Act of 1979 (1979 Act), Pub. L. No. 96-39, Tit. I, 93 Stat. 150; *id.* § 106, 93 Stat. 193, it reaffirmed its intent to protect domestic industry from unfairly priced foreign imports.

The Senate Report accompanying the 1979 Act explained that dumping is one of "the most pernicious practices which distort international trade to the disadvantage of United States commerce," and that the revisions to the antidumping-duty statute were designed, among other things, to provide for more effective relief for domestic industry. S. Rep. No. 249, 96th Cong., 1st Sess. 37 (1979).

b. As Commerce concluded in its determinations in this case, the harms that Congress sought to prevent are not lessened when a domestic consumer acquires foreign merchandise at unfairly low prices by making separate purchases of raw materials and manufacturing processes, as opposed to buying the finished product (and, thereby, all of its components) at once. See Pet. App. 232a, 239a-241a. The statute itself makes clear that unfair prices may be the result of undercharging for the cost of raw materials, of production processes, or both. See 19 U.S.C. 1677b(e)(1) (providing that, where the "normal value" of a good cannot be established by reference to the prices prevailing in foreign markets, the "constructed value" of the merchandise is based in part on "the cost of * * * fabrication or other processing of any kind employed in producing the merchandise," as well as "the cost of materials").

For purposes of the antidumping-duty law, whether a domestic customer pays for the raw materials and the production at the same time and pursuant to the same contract, or at different times under different contracts, is far less important than the end result: the importation of a finished product for a price. If that price represents less than the fair value of the product, then, no matter how the transaction was structured, any injury to domestic industry is the same. The transaction may

have displaced a sale that would otherwise have been made by domestic industry, or depressed the prices of domestic merchandise. As Commerce explained, to draw distinctions between merchandise obtained strictly via cash exchange and merchandise obtained through delivery of a combination of cash and raw materials would "expos[e] industries to injury by unfair trade practices without the remedy of" the antidumping-duty law, and thus "contravene the intent of Congress." Pet. App. 239a.

*3. Commerce's interpretation prevents evasion of the statute*

Commerce's decision also serves the important end of avoiding circumvention of the antidumping-duty law.

a. As Commerce recognized, the production of virtually all merchandise involves processing for which the parties could contract separately, in the same manner as under SWU contracts. Steel could be obtained by supplying iron ore for "smelting and rolling services"; lumber could be obtained by supplying trees for "harvesting and milling services"; semiconductors could be obtained by supplying silicon for "processing services." See Pet. App. 239a-240a. By focusing on the substance of such transactions rather than their form or structure, Commerce's interpretation of the statute avoids opening a loophole that would allow parties to evade antidumping duties simply by restructuring their transactions to avoid paying for raw materials and manufacturing in a single transaction.

This Court has endorsed similar approaches in analogous contexts. It has held that it is reasonable for an administrative agency to look behind the form of a transaction, including the parties' arrangements for

transfer of title, to determine whether there has been a "sale" of a particular commodity that is subject to federal regulation. See *United Gas Improvement Co.*, 381 U.S. at 400-401; *Gray*, 314 U.S. at 414-417; see also *SEC* v. *National Sec., Inc.*, 393 U.S. 453, 466-467 (1969) (affirming the SEC's construction of the statutory term "purchase or sale of any security" under the antifraud provisions of the securities laws to include a stock swap accomplished during a merger). The Court likewise has frequently employed a "doctrine of substance over form" in which it "has looked to the objective economic realities of a transaction rather than to the particular form the parties employed" to evaluate its tax consequences, *Frank Lyon Co.* v. *United States*, 435 U.S. 561, 572-573 (1978); see, *e.g.*, *Boulware* v. *United States*, 128 S. Ct. 1168, 1176 (2008). And the Court has applied a similar rule in evaluating the proper enforcement of other regulatory regimes. See, *e.g.*, *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 688 (1985) (noting that the Court has "decided a number of cases in which it looked to the economic substance of the transaction, rather than just its form, to determine whether" the securities laws applied).

In this case, Commerce understood that a rule that would allow form to trump substance would encourage industries to structure acquisitions of foreign merchandise in a manner that avoided imposition of antidumping duties. The result would be to eviscerate the protections that Congress intended to afford domestic industry by enacting the antidumping-duty statute. Commerce's determination sensibly avoids that result.

b. Respondents have argued (Eurodif Br. in Opp. 16-17, AHUG Br. in Opp. 22 & n.17) that Commerce's concerns about widespread circumvention are unfounded.

They contend that, even if Commerce cannot impose antidumping duties on contract-manufactured goods when they are first acquired by a U.S. customer, Commerce can always impose antidumping duties on domestic sales of merchandise that incorporates the imported materials. See Eurodif Br. in Opp. 16-17 (arguing that "the first downstream domestic sale of * * * an article in which [imported materials] were incorporated[] would trigger applicable dumping duties"). According to respondents, the uranium industry is an unusual exception to that rule because "the imported material (LEU) is consumed in a nuclear reactor and thus no sale in the United States occurs." *Id.* at 16.

Contrary to respondents' argument, that domestic utilities "consume" imported LEU in the production of electricity, rather reselling it in tangible form, does not render this case unique. A domestic entity might similarly "consume" processed steel, milled lumber, or semiconductors by using them in its own operations, *e.g.*, in equipment used to produce other items.

In any event, if foreign merchandise is not subject to an antidumping-duty order when it enters the United States, the subsequent sale of that merchandise in the United States does not trigger liability for antidumping duties. Upon entry of non-subject merchandise into the United States, liquidation (*i.e.*, processing) of the entry documents is not suspended pending final determination of antidumping duties, and no deposits of estimated antidumping duties are collected. 19 U.S.C. 1673b(d)(1)(B) and (d)(2).

Commerce refers to downstream sales in situations in which merchandise indisputably subject to antidumping duties has been sold by a foreign producer to an affiliated party in the United States. In such situations,

Commerce cannot calculate a dumping margin on the basis of the nominal price between the related parties. Commerce instead constructs an export price by taking the price of the first downstream sale by the U.S. purchaser to an unaffiliated customer in the United States, and subtracting expenses incurred after importation. 19 U.S.C. 1677a(e). Where, as here, there is no allegation that the foreign seller is affiliated with the U.S. purchaser, downstream sales would not be used to calculate dumping margins, and the existence or nonexistence of such sales would be irrelevant.

c. Although the prospect of the evasion of antidumping duties with respect to manufactured goods generally is a matter of considerable concern, it is of particular concern in the sensitive context of trade in enriched uranium. The proper application of the trade laws in this context serves important national security and foreign policy interests.

In particular, application of the antidumping-duty statute to imports of LEU provides the essential backdrop to a key element of this Nation's nuclear nonproliferation policy, the United States' Highly Enriched Uranium (HEU) Agreement with the Russian Federation. See Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted From Nuclear Weapons (HEU Agreement), Feb. 18, 1993, Hein's No. KAV 3503, State Dep't No. 93-59, 1993 WL 152921. Under the HEU Agreement, the Russian Federation has undertaken by 2013 to convert 500 metric tons of weapons-grade HEU—enough for approximately 20,000 Russian nuclear warheads—into LEU for use in generating electricity in the United States. In return, the United

States has agreed to purchase LEU downblended from 30 metric tons of weapons-grade HEU each year through 2013. See *ibid.*

The foundation for the HEU Agreement was laid in 1992, when Commerce agreed to suspend an antidumping investigation into Russian uranium that had been prompted by a surge of low-price Russian uranium imports into the United States. See *Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan*, 57 Fed. Reg. 49,235 (1992) (notice of suspension of investigations and amendment of preliminary determinations). The antidumping suspension agreement restricts imports of Russian LEU produced through commercial enrichment processes, but exempts from those restrictions "any or all" HEU, and LEU produced through a process of downblending HEU "resulting from the dismantlement of nuclear weapons." *Id.* at 49,237.

The suspension agreement, which was negotiated in parallel with the HEU Agreement, provides an important incentive for the Russian Federation to produce LEU for export through a process of downblending, rather than through the less costly (and hence more profitable) method of enriching natural uranium through commercial processes. Russia is the largest enricher of uranium in the world, and enriching natural uranium for commercial LEU sales is the most economically viable use of its vast enrichment capacity. See Issues and Decision Memorandum for the Sunset Review of the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation 6 (June 6, 2006) <http://ia.ita.doc.gov/frn/summary/RUSSIA/E6-8758-1.pdf> (Sunset Review Memorandum); *Final Results of Five-Year Sunset Review of Suspended Antidumping*

*Duty Investigation on Uranium from the Russian Federation*, 71 Fed. Reg. 32,517 (2006). Today Russia has substantially more enrichment capacity than necessary to supply its own domestic market, and other markets—notably in the European Union and Asia—have imposed restrictions on imports of Russian uranium products. Sunset Review Memorandum 6.

Absent full implementation of the suspension agreement, Russia would have a strong financial incentive to direct its enrichment capacity toward commercial enrichment of natural uranium for the U.S. market, rather than downblending weapons-grade uranium, for the same market at higher cost. Sunset Review Memorandum 6. But full implementation of the suspension agreement depends on full enforcement of the antidumping-duty law to imports of LEU, including LEU purchased pursuant to SWU contracts. See 19 U.S.C. 1673c(c) (generally limiting scope of suspension agreements to "subject merchandise").[6]

***4. Commerce's now-withdrawn tolling regulation provides no basis for rejecting the agency's statutory interpretation***

Respondents have argued (Eurodif Br. in Opp. 14-15; AHUG Br in Opp. 8-9, 20) that Commerce's decision in this case is inconsistent with its now-withdrawn tolling regulation. See 19 C.F.R. 351.401(h) (2007) (providing that Commerce will "not consider a toller or subcontrac-

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[6] The CIT is currently reviewing a challenge to Commerce's decision not to terminate the Russian suspension agreement, in which the plaintiffs have argued that, under the court of appeals' decision in this case, the suspended investigation must exclude LEU obtained pursuant to SWU contracts. *Techsnabexport* v. *United States*, 515 F. Supp. 2d 1363, 1367-1370 (Ct. Int'l Trade 2007).

tor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise"), withdrawn by 73 Fed. Reg. 16,517 (2008). Respondents are incorrect.

By its terms, the tolling regulation (even when it was in effect) had no bearing on the question presented here. See Pet. App. 17a-24a, 27a. The regulation appeared in a section of Commerce's regulations that "establishes certain general rules that apply to the calculation of export price, constructed export price and normal value." 19 C.F.R. 351.401(a). Thus, as the CIT itself acknowledged, while the tolling regulation provided guidance for calculating the dumping margin for goods within the scope of the antidumping-duty law, it "[did] not provide a basis to exclude merchandise from the scope of an [antidumping] investigation." Pet. App. 191a (citation omitted); see *id.* at 235a-236a.[7]

Respondents have also relied (Eurodif Br. in Opp. 14-15, 17; AHUG Br. in Opp. 9 & n.9, 20 & n.13) on administrative decisions in which Commerce applied the tolling regulation to identify the sale between contractor and buyer, as opposed to the sale between subcontractor and the contractor, as the relevant sale for purposes of calculating the dumping margin. Respondents emphasize, as did the CIT, that in one such decision, Commerce stated that it "do[es] not consider the 'sale' be-

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[7] The CIT in this case did, however, reject Commerce's conclusion that the tolling regulation does not apply in determining whether domestic utilities qualify as producers for purposes of export-price calculations. Pet. App. 50a-56a. The Federal Circuit did not address that ruling, see *id.* at 27a, and it is not at issue here. Commerce withdrew the tolling regulation in response to the CIT's misreading of the regulation. See 73 Fed. Reg. at 16,517.

tween the subcontractor and * * * a contractor to be a sale of subject merchandise at all," but rather to be "a sale of certain inputs and subcontracting services." Pet. App. 193a-194a (quoting Response to Court Remand at 5, *Taiwan Semiconductor Mfg. Co.* v. *United States*, 143 F. Supp. 2d 958 (Ct. Int'l Trade 2001) <http://ia.ita.doc.gov/remands/00-48.htm>).

But the question in those cases was not whether there was a "sale" of merchandise for purposes of application of the antidumping-duty law; it was whether a particular sale qualified as the "*relevant* sale" for purposes of calculating the dumping margin in accordance with Commerce regulations. 19 C.F.R. 351.401(h) (2007) (emphasis added). And as Commerce explained in this case in its determination on remand from the CIT, in its prior decisions Commerce had always confronted that question in the context of situations in which "both the toller and the tollee would make sales that could be construed as sales of subject merchandise"; Commerce applied the tolling regulation to select the tollee as the respondent "producer" for purposes of constructing the relevant export price. Pet. App. 122a-124a. That selection reflected the agency's "preference [for] select[ing] the respondent whose price covers the full cost of production (*i.e.*, the full value of the subject merchandise)." *Id.* at 128a.

Commerce further explained, however, that in no instance did the agency apply the regulation to determine that the tolling transactions were entirely beyond the reach of the antidumping-duty law. Pet. App. 112a, 235a. To the extent that the language of the agency's prior decisions might have suggested that the transaction between toller and tollee could *never* result in a relevant sale for purposes of calculating the dumping mar-

gin, Commerce reasonably determined that such a result in this case would frustrate the purpose of the regulation and of the antidumping-duty statute in a situation where, as here, the tollee does not sell the toll-produced merchandise. *Id.* at 124a, 128a-129a, 157a-158a.

Commerce's determination not to allow prior decisions concerning dumping-margin calculations to control the threshold question whether the antidumping-duty statute applies at all was a reasonable choice, given the breadth and flexibility of the statutory scheme. The statute provides Commerce with a wide array of tools with which to determine the difference between the price of the imported merchandise with the value of that same (or comparable) merchandise in the home market. Although Commerce normally establishes the dumping margin by comparing the prices of sales in each market, the statute provides a broad range of alternatives where prices are not available for that purpose.

For example, the price of the merchandise imported into the United States can be established on the basis of the price charged upon export (19 U.S.C. 1677a(a)), the price at which a reseller in the United States who is affiliated with the foreign producer first resells the merchandise in the U.S. market (19 U.S.C. 1677a(b)), or the price of a lease equivalent to a sale (19 U.S.C. 1673). Where the imported merchandise is transferred to a related party in the United States that incorporates it into a different product that is sold in the United States, Commerce may use the price at which merchandise comparable to the imported merchandise is sold, or "any other reasonable basis." 19 U.S.C. 1677a(e).

Similarly, the statute permits Commerce to determine the value of the comparable merchandise in the home market (*i.e.*, "normal value") on the basis of actual

home market prices of such merchandise (19 U.S.C. 1677b(a)(1)(B)); the price of merchandise when sold to third countries (19 U.S.C. 1677b(a)(1)(C)); the constructed value of the merchandise sold in the United States (19 U.S.C. 1677b(a)(4)), based on, *inter alia*, costs of materials and fabrication (19 U.S.C. 1677b(e)); in the case of non-market economy countries, the constructed value of the merchandise based on the factors of production in the home market, as valued in a market economy country (19 U.S.C. 1677b(c)(1)); and the price of comparable merchandise sold in other countries (19 U.S.C. 1677b(c)(2)). As Commerce explained, the statute's provisions concerning the calculation of dumping margins are consistent with the principle that "the form of the sale" need not control "the application of the law." Pet. App. 232a.

In short, nothing in Commerce's prior applications of the tolling regulation undermines Commerce's reasonable conclusion that the antidumping-duty statute covers imports of foreign merchandise produced via contract manufacturing. Those decisions concerned a question—namely, how to calculate antidumping duties—that is logically distinct from the threshold question whether the antidumping-duty statute applies at all. And to the extent that the language of Commerce's prior decisions is in tension with its determination that the antidumping-duty statute applies to the merchandise at issue in these proceedings, Commerce was entitled to exercise its expert judgment in resolving that tension. As this Court explained in *Chevron*, an "agency interpretation is not instantly carved in stone. On the contrary, the agency * * * must consider varying interpretations and the wisdom of its policy on an ongoing basis." *Chevron*, 467 U.S. at 863-864. "Agency inconsis-

tency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework"; "if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of the statute with the implementing agency.'" *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (quoting *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)). Commerce in this case fully explained its reasons for declining to embrace the full possible implications of the language in its prior tolling decisions, which would frustrate Commerce's ability to give the antidumping-duty statute its intended scope.

### C. Additional Reasons Identified By Commerce After Reviewing the Contracts And Other Record Evidence Support Its Decision To Impose The Antidumping Duties At Issue

Commerce's decision to focus on the substance, rather than the form or structure, of contract-manufacturing arrangements reflects a permissible interpretation of the statutory text and a reasonable policy choice to which the court of appeals should have deferred. But even if the antidumping-duty statute's reference to the "sale" of merchandise can be read unambiguously to require something more than the facts that are present in contract-manufacturing transactions generally—that is, the delivery of a newly produced good to a customer that ordered its manufacture, in return for consideration—the court nevertheless erred in overriding Commerce's determination in this case. After examining "the contracts and other evidence of record," Commerce identified salient features of SWU transactions that

make it particularly clear that the transactions "represent the transfer of ownership in the complete LEU product for consideration." Pet. App. 131a. That determination, concerning a matter within the agency's expertise, is reasonable, and warrants deference as well.

*1. Commerce reasonably disregarded the fiction that enrichers merely return the customer's unenriched uranium in enriched form*

When Commerce examined the SWU contracts and other record evidence in accordance with the CIT's remand instructions (Pet. App. 69a-177a), it made two findings of particular relevance here: (1) that, although utility customers hold title to the natural uranium feedstock they provide to the enrichers, title to the finished LEU passes to the utilities only upon delivery of the LEU, and (2) that, because enrichers treat feedstock as fungible, the LEU delivered to the customer bears no necessary relationship to the feed uranium that the customer provided to the enricher. *Id.* at 131a-134a. The finished LEU product the customer receives is not simply the customer's own original unenriched uranium, returned in enriched form; the result of a SWU transaction is that a utility that originally had title to a particular lot of raw material ends up with title to a lot of finished LEU that bears no necessary relationship to the raw material it furnished (along with cash) to the enricher.

a. After examining the contracts and other evidence, Commerce concluded that "the utility customers hold title to the natural uranium feedstock that they provide to the enrichers," but that they do not have or receive title to the finished LEU immediately upon its production. Pet. App. 132a ("The contracts state that the

enrichers transfer title to the LEU to the utilities upon production and delivery of the LEU."); *id.* at 133a ("[A]t the point in time in which the enricher produces the LEU but before delivery is performed, the customer * * * does not hold title to the LEU."); see, *e.g.*, C.J.A. 17, 333. The enricher bears the risk of loss with respect to the LEU until it is delivered. Pet. App. 256a; see, *e.g.*, C.J.A. 18, 189. Commerce further found that the utility's title to the quantity of feedstock furnished to the enricher is extinguished upon receipt of the LEU. Pet. App. 132a; see, *e.g.*, C.J.A. 17, 188.

The courts below understood the arrangements in similar terms. See Pet. App. 20a (explaining that "the utility retains title to the quantity of unenriched uranium that it supplies to the enricher," and that title in the feedstock "is only extinguished upon the receipt of title in the LEU for which [the utility] contracted"); see *id.* at 44a (citing discussion noting that "title passes to the enriched product" only when "it is returned in enriched form") (citation omitted). Commerce therefore reasonably determined that, upon production of the LEU, "the enrichers own the LEU, including the right to sell the LEU at issue to any buyer." *Id.* at 133a-134a.

b. Commerce acknowledged that the contractual provisions "establish[] a legal fiction that the enrichment process will be performed on the uranium provided by the customer." Pet. App. 133a (citation omitted). As explained above, see pages 25-44, *supra*, Commerce reasonably concluded that the legal fiction, even if accepted, would not exempt the finished product from the antidumping-duty statute. But Commerce also concluded that, in this case, the fiction did not comport with fact; the record made clear that the contracts were dedicated

to delivery, for consideration, of the complete LEU product, and not only the manufacturing component.

Record evidence shows that, when a customer arranges for the delivery of unenriched uranium under a SWU contract, the enricher does not segregate the customer's feed uranium for separate processing, but adds it to its store of feed uranium. *E.g.*, J.A. 121, 265; C.J.A. 17; see Pet. App. 133a. Although the customer retains title to the feed uranium it had delivered to the enricher, the enricher's commingling of the feedstock means that the customer cannot demand return of the specific lot of feed uranium it had supplied. See *ibid.*

Nor, in fulfilling its obligations under the contract, is the enricher necessarily limited to processing the specific *quantity* of feed uranium the customer had supplied. To produce the finished LEU product, the enricher may use more or less feed uranium than the customer had supplied, Pet. App. 253a, and, indeed, may deliver the finished LEU product *before* it ever receives feed uranium from the customer, *id.* at 133a. The operation of the SWU contract scheme thus "mak[es] it impossible to conclude that the LEU produced and delivered by the enricher is in any way derived from the uranium supplied by the customer." *Ibid.* Respondents have acknowledged that, at the time the LEU is imported into the United States, the enricher generally does not know the utility to which a specific shipment of LEU is to be delivered, or whether its production was governed by a SWU contract or an EUP contract. See J.A. 304-306; J.A. 299 ("[I]mports of LEU frequently are not allocated to specific SWU contracts or orders prior to importation—or even at the time of entry."). They have also acknowledged that the enricher generally ships the LEU to a nuclear fuel fabricator in the United States

and "delivers" the LEU to the customer by directing the fabricator to make a book transfer of the LEU to the customer's account. J.A. 299-300; see, *e.g.*, C.J.A. 15, 332, 470.

Based on this evidence, Commerce reasonably concluded that it is in fact a complete LEU product that is "sold" as a result of a SWU contract, and not only the enrichment component. Although, as Commerce acknowledged, the utilities' provision of feed uranium "may not be a payment-in-kind in the formal sense under these contracts, * * * the arrangement between buyer and seller in a SWU contract nonetheless is dedicated to the delivery of LEU." Pet. App. 254a. By providing a combination of raw materials and monetary payment as consideration, a utility obtains title to a lot of finished LEU product that bears no necessary relation to the unenriched uranium the utility furnished to the enricher. Commerce determined, based on that arrangement, that, "[b]etween the time in which the LEU is produced and the time in which it is delivered as specified under the contract, the enricher holds title and holds ownership in the *complete* LEU product." *Id.* at 133a (emphasis added). And enrichers "sell" that product "when they transfer ownership of the *complete* LEU to the utilities through delivery of such merchandise for consideration." *Id.* at 134a (emphasis added).

c. That SWU transactions result in the passage of title to a finished product that bears no necessary relationship to the customer's raw materials makes amply clear that SWU transactions are permissibly termed "sales." Similar usages of the term were common long before the antidumping-duty statute was enacted. This Court, in *Powder Co.* v. *Burkhardt*, 97 U.S. 110 (1878), concluded that the question of fungibility is what distin-

guishes a common-law "bailment" from a "sale." The Court explained:

> [W]here logs are delivered to be sawed into board, or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is said to be a sale or loan, and the title to the thing delivered vests in the manufacturer. We understand this to be a correct exposition of the law.

*Id.* at 116; accord *Sturm* v. *Boker*, 150 U.S. 312, 329-330 (1893); see, *e.g.*, *B.A. Ballou & Co.* v. *Citytrust*, 591 A.2d 126, 130 (Conn. 1991). Although the Congress that drafted the antidumping-duty statute may not have specifically meant, by the use of the word "sold," thereby to incorporate the definition of "sale" prevailing in the law of bailments, that definition is at least one permissible way to understand the text of the antidumping-duty statute.

Of course, the fungibility of raw materials makes little difference as a matter of statutory policy; whether the manufacturer delivers a product that contains the customer's own raw materials, or merely materials that are equivalent to those the customer had supplied, is largely irrelevant from the standpoint of protecting domestic industry from the harms of unfair foreign price competition. But if it was somehow unreasonable for Commerce to conclude that imported merchandise produced pursuant to contract-manufacturing transactions,

without more, may be considered "merchandise * * * sold" within the meaning of Section 1673, it surely was reasonable for Commerce to conclude that *these* contract-manufacturing transactions, under which utilities exchange money and a quantity of raw materials for title to a quantity of finished LEU that bears no necessary relationship to the raw materials the customer had provided, result in merchandise being "sold" within the meaning of the statute.

2. ***The court of appeals erred in assigning dispositive significance to the absence of contractual provisions explicitly vesting title in the enricher***

Addressing Commerce's review of the record in this case, the court of appeals overrode Commerce's application of the antidumping-duty statute based on the court's own determination that the parties to SWU transactions do not intend to vest ownership of the raw materials or the finished merchandise in the enricher "during the relevant time periods that the uranium is being enriched." Pet. App. 20a. The court concluded that, absent evidence of "any intention by the parties to vest the enrichers with ownership rights in * * * the finished LEU," enrichers cannot be said to "sell" LEU to utilities pursuant to SWU contracts. *Ibid.* That conclusion is incorrect.

As a preliminary matter, the Federal Circuit's ruling is directly contrary to Commerce's finding, based on the contracts and other record evidence, that, "between the time in which the LEU is produced and the time in which it is delivered as specified under the contract, the enricher holds title and holds ownership in the complete LEU product." Pet. App. 133a. Commerce's finding on that point is supported by substantial evidence. But

even leaving that agency finding aside, the Federal Circuit's determination is in considerable tension with the facts that utilities do not receive title to the LEU immediately upon its production, and that the utilities have no title to the specific lot of feed uranium used to produce that LEU. *Id.* at 20a, 44a, 132a, 133a. Those facts support Commerce's determination that, when title to the finished LEU passes to the utility, it passes from the enricher. The court of appeals nevertheless dismissed that conclusion, without so much as attempting to offer an alternative explanation for the identity of the party from whom title passes to the purchasing utility. *Id.* at 20a.

But more fundamentally, even assuming *arguendo* that the Federal Circuit was correct that the enricher never formally acquires title to the LEU, there is no basis in the statute for requiring that the parties provide for title to vest in the manufacturer before a SWU-type transaction can be considered a "sale" of "foreign merchandise," namely, finished LEU. The antidumping-duty statute only asks, in the passive voice, whether foreign merchandise "is being * * * sold." 19 U.S.C. 1673(1). It does not unambiguously require proof of the parties' intention to vest any particular party with title to the merchandise before the customer obtains title. It is undisputed that, under a SWU-type arrangement, a utility provides raw materials and monetary consideration to the enricher and, in exchange, receives delivery of and title to finished LEU that is not necessarily traceable to the particular lots of uranium feedstock supplied by the utility. Pet. App. 20a, 131a-132a. In these circumstances, Commerce acted reasonably in concluding that what occurs is a sale.

Finally, the court of appeals' inquiry into the parties' intentions with respect to ownership rights is particularly misplaced in the context of a regime designed to remediate unfair trade practices. The intent of parties to a contract is of course an important consideration in the law of contracts. See, *e.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839, 911 (1996) (Breyer, J., concurring). But giving dispositive effect to private documents or intentions in determining whether a federal regulatory regime applies to the product of parties' dealings would permit the parties to decide for themselves whether to opt in or out of regulation.

Commerce's decision avoids that absurd result, and in a manner that is consistent with statute's text and that advances the statute's purposes of protecting domestic industry from the harms of unfair foreign competition. The court of appeals erred in overriding its determination.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## APPENDIX

## STATUTORY PROVISION INVOLVED

19 U.S.C. 1673 provides:

**Imposition of Antidumping Duties**

If—

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise. For purposes of this section and section 1673d(b)(1) of this title, a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of the merchandise.

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Nos. 07-1078, 07-1059

FILED

IN THE

# Supreme Court of the United States

USEC INC. and
UNITED STATES ENRICHMENT CORPORATION,

*Petitioners,*

*v.*

EURODIF S.A.; COMPAGNIE GENERALE DES MATIERES NUCLEAIRES; COGEMA, INC.; and AD HOC UTILITIES GROUP,

*Respondents.*

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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## QUESTION PRESENTED

The antidumping law allows for duties to be imposed on "foreign merchandise . . . sold in the United States at less than its fair value." The Commerce Department construed that phrase as including transactions in which a U.S. customer furnishes cash and fungible raw material to a foreign producer and receives a substantially transformed finished product. The question presented in this case is whether the Federal Circuit erred in failing to accord *Chevron* deference to that construction, when a contrary one will prevent the Commerce Department from applying the antidumping law to imports causing or threatening material injury to a domestic industry.

## PETITION RULE 29.6 STATEMENT

The corporate disclosure statement contained in USEC's Petition for Writ of Certiorari, Pet. ii, remains accurate.

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## OPINIONS BELOW

The final judgment of the court of appeals is reported at 506 F.3d 1051 and reprinted in the Appendix to USEC's Petition at 31a.

The question presented by this petition was raised and decided on interlocutory appeal; the court of appeals' judgment on interlocutory appeal is reported at 411 F.3d 1355 (USEC Pet. 1a), affirmed on rehearing at 423 F.3d 1275 (USEC Pet. 24a). The decision of the U.S. Court of International Trade from which interlocutory appeal was taken is reported at 281 F. Supp. 2d 1334 (USEC Pet. 268a). The Department of Commerce's original determination is reported at 66 Fed. Reg. 65,877 (USEC Pet. 41a), and its redetermination following initial judicial review, USEC Pet. 147a, is available at http://ia.ita.doc.gov/remands/03-34.pdf.

## JURISDICTION

The judgment of the court of appeals was entered on September 21, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000).

## STATUTORY PROVISIONS INVOLVED

Section 1673 of Title 19, U.S. Code (2000), provides in relevant part that:

> If—
>
> (1) the administering authority [the Department of Commerce] determines that a

class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the [U.S. International Trade] Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise, or by reason of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise. For purposes of this section and section 1673d(b)(1) of this title, a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of the merchandise.

## STATEMENT OF THE CASE

Petitioner USEC Inc., through its wholly-owned subsidiary United States Enrichment Corporation (collectively USEC), is the sole domestic producer of low enriched uranium (LEU). USEC has been injured by unfairly priced imports of LEU produced by respondent Eurodif S.A. (Eurodif). In some of these import transactions, the U.S. customer paid Eurodif cash that reflects the entire value of the LEU. In other transactions where the customer received LEU, the customer paid cash and also supplied a quantity of unenriched uranium. There is no difference in the LEU delivered under either form of transaction, or in the manner in which the LEU is produced. Eurodif produces all LEU from fungible inventories of unenriched uranium. Thus, the LEU received by a customer is not produced from the specific raw material supplied by that customer.

Upon USEC's petition, the Department of Commerce (Commerce or the Department) concluded that all of these import transactions constituted sales of LEU under the antidumping law, and the United States International Trade Commission (the Commission) found that the domestic enrichment industry had been injured by Eurodif's imports. The Commerce Department issued an order imposing offsetting antidumping duties. The Federal Circuit, however, reversed Commerce's determination. It concluded that those transactions in which the customer supplied Eurodif with unenriched uranium involved sales of services, not sales of merchandise, and therefore were outside the scope of the antidumping law.

This case raises the question whether the Commerce Department can reasonably determine that foreign merchandise has been "sold" within the meaning of the antidumping law where a U.S. customer furnishes cash and fungible raw material to a foreign producer and, in return, receives a substantially transformed product (*i.e.*, a new and different article of commerce).

## I. STATUTORY BACKGROUND

"Dumping" describes the practice of international price discrimination whereby a producer or exporter sells merchandise in an export market at less than fair value. The U.S. antidumping statutory framework is embodied in the Tariff Act of 1930, *as amended* (the Act). The Act states that "dumping" "refer[s] to the sale or likely sale of goods at less than fair value." 19 U.S.C. § 1677(34) (2000).[1] The Act provides that, when "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," and when imports or sales of such merchandise cause or threaten to cause material injury to an industry in the United States, antidumping duties shall be imposed on imports of that merchandise. *Id.* § 1673.

The Commerce Department and the Commission are jointly responsible for administering the antidumping law. Commerce determines whether foreign merchandise is being sold in the United States at less than its fair value, *id.* §§ 1673(1), 1677(1), and the Commission determines whether a domestic industry

---

[1] Unless otherwise indicated, all references to the United States Code are to Title 19 of the 2000 edition.

producing a product like the imported merchandise has been materially injured or threatened with material injury by reason of imports of that product. *Id.* §§ 1673(2), 1677(7) & (10). Upon the filing of a petition by an affected domestic industry, each agency conducts its own investigation, and if both agencies make affirmative final determinations, Commerce will issue an antidumping duty order. *Id.* § 1673d(c)(2).

In its investigation, Commerce calculates a dumping margin based on the "normal value," which is generally determined by reference to the prices at which the producer or exporter sells the same goods in its home market or in third country markets. If there are no appropriate home or third country market sales, the Department determines normal value by calculating the constructed value of the merchandise (*i.e.*, the cost of producing the subject merchandise, including selling, general, and administrative expenses and profit). The dumping margin is the amount by which the normal value exceeds the U.S. price of the subject merchandise. *Id.* § 1677(35)(A). Importers of merchandise subject to an antidumping duty order must then pay cash deposits in the amount of this dumping margin when entering that merchandise into the United States. *Id.* § 1673e(a)(3). The actual amount of duty owed on particular imports is determined retrospectively through administrative reviews that may be requested on an annual basis. *Id.* § 1675(a).

## II. FACTUAL BACKGROUND

### A. The Production of LEU

Nuclear power plants use fuel rods fabricated from low enriched uranium (LEU) to produce electricity. LEU does not exist in a natural state, but must be produced through a multi-stage process.

Only one uranium isotope is fissionable—$U_{235}$. Its concentration in natural uranium is only 0.711 percent by weight. Most nuclear utilities require fabricated fuel with a $U_{235}$ concentration ("assay") in the range of 3 to 5% by weight. Enrichment is the manufacturing process by which the level of fissionable $U_{235}$ is increased to these levels. J.A.-40-43. Uranium in which the $U_{235}$ assay has been enriched to a level of 20% or more is weapons-grade material and is referred to as "highly enriched uranium" or "HEU."

Uranium moves through several stages before it is enriched. After the uranium ore is mined, it is then milled or refined into uranium concentrate ($U_3O_8$), and then converted into uranium hexafluoride ($UF_6$). The $UF_6$ (referred to as "unenriched uranium" or "feed uranium") is then enriched. *See* USEC Pet. 102a-103a. It is the enrichment that results in the uranium reaching a fissionable form.

Both USEC and Eurodif use the gaseous diffusion method for producing LEU. Their plants are among the largest manufacturing facilities of any kind in the world, and require enormous amounts of electricity to operate. The gaseous diffusion process involves continuously

forcing and recycling uranium hexafluoride gas under pressure through hundreds of cascades, each of which contains porous membranes. As the $U_{235}$ molecules are lighter than the other molecules, the process results in two streams of gas, one enriched in $U_{235}$ (the LEU) and one that is somewhat depleted in $U_{235}$ (the "tails"). J.A.-40-43.

The laws of physics permit the calculation of the separative effort required to produce LEU at a given $U_{235}$ concentration (or assay) and a tails stream of a given $U_{235}$ assay from a particular quantity of unenriched uranium. That effort is measured in terms of "separative work units" (or SWU) and is calculated using an industry-standard formula. USEC Pet. 104a.[2]

### B. Enrichers

The United States has only one plant in operation that produces LEU for nuclear fuel used in generating electricity. This plant, located in Paducah, Kentucky, is owned by the U.S. government. It is operated by USEC pursuant to a lease with the Department of Energy transferred to USEC pursuant to the USEC Privatization Act of 1996, 42 U.S.C. § 2297h. Prior to the 1998 privatization of USEC, the enrichment facilities were operated under this same lease by USEC's predecessor, a federal corporation known as the United

[2] The industry-standard formula is set out as an appendix to the SWU contracts in the Joint Appendix, *e.g.*, C.J.A.-48. The amount of SWU determined by the formula to be required for a particular quantity and assay of LEU is the same irrespective of how the LEU is produced (*e.g.*, whether through the gaseous diffusion process used by USEC and Eurodif, or the centrifuge process used by other enrichers).

States Enrichment Corporation. The facilities themselves were built in the 1950's by the U.S. government and were operated by the Atomic Energy Commission, and later the Department of Energy, to serve U.S. national and energy security interests that are still important today.

Eurodif S.A., the enricher in France, is 60% owned by AREVA NC (formerly named Compagnie Générale Des Matières Nucléaires, or COGEMA). AREVA NC is a wholly owned subsidiary of AREVA S.A. Affiliates of AREVA S.A. are engaged in the mining, conversion, and enrichment phases of the production of nuclear fuel. Approximately 84% of AREVA S.A. is owned, directly or indirectly, by the Government of France.

### C. Contractual Arrangements For LEU

Enrichers and their utility customers generally enter into two types of contracts: "EUP" contracts (which refers to enriched uranium product contracts) or "SWU" contracts (which refers to "uranium enrichment services contracts"). These contracts typically cover deliveries of LEU over a period of years. In many regards, the provisions in EUP contracts and SWU contracts are similar (*compare* the SWU contract at C.J.A.-1-67 *and* the EUP contract at C.J.A.-325-377). There is no difference in the LEU that is delivered to customers pursuant to either type of contract, or in how the LEU is produced. They are simply alternative arrangements by which utilities can obtain the LEU they need.

In an EUP transaction, the utility obtains LEU and pays a cash price that covers the entire value of the

LEU, including both the uranium and enrichment components. There is no dispute that LEU imports pursuant to EUP contracts involve sales of merchandise subject to the antidumping law.

In a SWU transaction, the utility obtains LEU and furnishes unenriched uranium to the enricher as well as cash. The amount of cash paid is based on the number of SWUs deemed to be contained in the LEU delivered (as calculated using the industry-standard formula discussed above), and the price per SWU as specified in the SWU contract. The utility under both EUP and SWU contracts specifies the amount of LEU and the level of concentration (or assay) of the LEU to be delivered, whether in the contract itself or in purchase orders submitted to the enricher during the term of the contract. Under a SWU contract, however, the customer may select the mix of unenriched uranium and cash (within a range allowed by the enricher) that it provides in exchange for the LEU.

Irrespective of the mix of cash and unenriched uranium that customers provide to the enricher, the enricher has total control over how it actually produces LEU. The enricher must provide the amount of LEU at the $U_{235}$ assay specified by the customer, but it is not required to do so using the proportions of SWU and unenriched uranium chosen by the utility as the basis for its obligations to the enricher. The enricher decides how best to operate its plant according to its own economics (*e.g.*, its cost of electricity, which is a significant cost factor for a gaseous diffusion plant), and its perception of the value of unenriched uranium. For example, the enricher may produce LEU using more

unenriched uranium than is provided by its customers (but less electricity), a practice known as "over-feeding." Alternatively, an enricher may use less unenriched uranium than is supplied by its customers (thereby generating additional inventory of unenriched uranium for itself), but will have to purchase additional electricity to produce LEU for its customers ("under-feeding"). Either way, as long as the customers receive the LEU specified in their contracts or purchase orders, the enricher has met its obligations.

The SWU contracts in this case also contain provisions stating that the utility customer has title to the unenriched uranium it supplies until the enricher delivers the LEU. Some contracts provide that the title to the unenriched uranium is deemed extinguished when the LEU is delivered. Some say nothing about what happens. *Compare* C.J.A.-17 and C.J.A.-87; *see also* USEC Pet. 218a.

There is no requirement in a SWU contract that the LEU be produced from the unenriched uranium delivered by the customer. In fact, because all unenriched uranium is fungible and because $U_{235}$ and other molecules are constantly being re-circulated through the cascades of the plant, the LEU delivered to a customer is not produced from the unenriched uranium delivered by that customer. Enrichers continuously produce LEU from their fungible inventory of unenriched uranium for delivery under both SWU and EUP contracts. The LEU delivered by an enricher may have been produced even before the utility provided any unenriched uranium or even before the order for the LEU was placed. USEC Pet. 49a, 219a. Indeed, the enricher need not actually perform any

enrichment. An enricher meets its contractual obligations under a SWU contract by delivering the requisite quantity of LEU at the specified product assay, even if the enricher obtains that LEU from another party. J.A.-229. Or, under SWU contracts an enricher can provide its customers with LEU that has been down-blended from highly enriched uranium, such as HEU in nuclear weapons. USEC Pet. 33.

### D. Delivery Of LEU To U.S. Customers

LEU that is ultimately going to be delivered to a U.S. utility customer is generally first shipped to one of several fabricators in the United States. The fabricator creates the nuclear fuel rods that can be utilized in nuclear reactors. Enrichers maintain accounts at the fabricators and the LEU shipped by an enricher to a fabricator is recorded to the enricher's account on the fabricator's books. C.J.A.-470-71, 492.

During the period covered by Commerce's antidumping investigation, all deliveries of French LEU to U.S. utility customers were effected by transfers on the books of U.S. fabricators. C.J.A.-548. That is, on the date Eurodif was to deliver the LEU to the utility customer, a transfer was effected on the books of the fabricator by debiting the AREVA account and crediting the account of the utility customer with the amount of LEU to be delivered. This method of delivery was followed with respect to LEU delivered pursuant to SWU contracts as well as EUP contracts.

## III. THE PROCEEDINGS BELOW

### A. The Commerce Proceedings

USEC initiated these proceedings by filing petitions with the Commerce Department and the Commission. Following a year-long investigation, Commerce issued its final determination. USEC Pet. 41a, *as amended*, USEC Pet. 90a (collectively Final Determination). The Department found that LEU from France was being sold in the United States at less than fair value. In addition, the Commission determined that these imports were causing injury to the domestic uranium enrichment industry. As a result of these determinations, Commerce issued an antidumping duty order with regard to imports of French LEU.

A central issue in the antidumping proceeding before Commerce was whether LEU imports pursuant to SWU contracts constituted sales of merchandise, subject to the antidumping law, or sales of services, outside the scope of that law. Because of the importance of this issue, Commerce asked for separate briefing and held a separate hearing on this issue.

Commerce concluded that all LEU entering the United States from France was subject to the antidumping law "regardless of the way in which the sales for such merchandise were structured." USEC Pet. 47a; *see also id.* 54a. Noting that "no party disputes that the LEU entering the United States constitutes merchandise," *id.* 52a, Commerce found that LEU is the product of a "major manufacturing operation," and that enrichment constitutes "substantial transformation" of

the uranium feedstock, thereby creating a "new and different article of commerce." *Id.* 52a, 62a-63a.

Commerce reasoned that "the unfair trade laws must be applicable to merchandise produced through contract manufacturing, just as they are applicable to merchandise manufactured by a single entity. To do otherwise would contravene the intent of Congress by undermining the effectiveness of the AD and CVD laws . . . ." USEC Pet. 63a. It rejected the notion that a SWU contract involved only a sale of services, and not a sale of goods subject to the antidumping laws: "We simply do not consider a major manufacturing process to be a 'service' in the same sense that activities such as accounting, banking, insurance, transportation and legal counsel are considered by the international trading community to be services." *Id.* 64a. Commerce expressed the concern that a contrary conclusion would allow foreign producers and U.S. customers to "convert trade in goods into trade in so-called 'manufacturing services,'" thereby creating a serious loophole in the antidumping law that would "expos[e] industries to injury by unfair trade practices without the remedy" provided by that law. *Id.* 63a.

Accordingly, Commerce applied the antidumping order to all imports of LEU from France, including imports pursuant to SWU contracts.

### B. CIT Review And Commerce's Redetermination

Eurodif and the Ad Hoc Utilities Group (AHUG), an association of U.S. utilities, contested the Final

Determination before the CIT. They argued that SWU contracts involved sales of services outside the antidumping law relying, in part, on Commerce's "tolling" regulation, 19 C.F.R. § 351.401(h) (2008). In a tolling arrangement, one party (the tollee) arranges for merchandise to be produced by another party (the toller), and pays for that contract manufacturing. The tolling regulation provided guidance as to which entity's prices and costs (*i.e.*, the toller's or the tollee's) would be examined in determining dumping margins.[3]

The CIT agreed with Commerce that the tolling regulation did not exempt imported merchandise from antidumping proceedings or orders. USEC Pet. 131a. Nevertheless, the CIT remanded the case for reconsideration of how the tolling regulation might affect the Department's conclusion that transactions under SWU contracts involved a sale of goods, not services.

On remand, the Department considered both the tolling regulation and its prior precedent. USEC Pet. 147a-148a. The Department found that the tolling regulation was inapplicable because it was designed to be used only where the tollee made a subsequent sale from which the price of merchandise could be obtained.

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[3] Commerce has recently revoked the regulation, explaining that the CIT's application of the regulation in this case on the issue whether U.S. utilities are foreign producers of LEU was contrary to the Department's intention in issuing the regulation and inconsistent with the Department's mandate to protect domestic industries suffering material injury from unfairly traded imports. Withdrawal of Regulations Governing the Treatment of Subcontractors ("Tolling Operations"), 73 Fed. Reg. 16,517 (Dep't Commerce Mar. 28, 2008).

It did not apply here, where the tollee imported the product for its own consumption. Further, the Department found that the SWU transactions were the relevant sales of goods from which an appropriate price could be obtained to calculate dumping margins.

In this context, Commerce explained why imports pursuant to SWU contracts constituted sales of goods. First, they involve "the transfer of ownership [from the enricher to the utility] in the complete LEU product for consideration . . . ." *Id.* 217a. Prior to the delivery of the LEU, "[t]he customer does not hold title to the LEU, nor does she hold title to the feed material contained within the recently produced LEU because the LEU produced by the enricher cannot be identified as having been derived from the feedstock provided by any particular customer." *Id.* 219a.

Commerce went on to explain that the enricher "hold[s] inventories of uranium from various sources, including uranium owned by the enricher itself, and produce[s] LEU without relying solely upon the input from a particular customer." *Id.* 221a. Commerce found:

> [T]he record indicates that LEU delivered to a utility customer by an enricher under an enrichment contract may be produced before any natural uranium supplied by that customer could have been part of the production process for that LEU, thereby making it impossible to conclude that the LEU produced and delivered by the enricher is in any way derived from the uranium supplied by the customer.

*Id.* 219a. Based upon these factors, Commerce concluded that "between the time in which the LEU is produced and the time in which it is delivered," the enricher "holds ownership" in the LEU and "the utility customers have no right of ownership with respect to the LEU that is produced, but not delivered . . . ." *Id.*

The CIT, on review, rejected the Department's conclusion. *Id.* 268a. The CIT focused exclusively on the terms of the SWU contracts, particularly the provision that the utility retains title to the feed uranium, rather than examining the total evidence of record considered by the Department. The CIT found that the contracts create a "legal fiction" that the uranium feed delivered by the utility is enriched by the enricher and returned as LEU to the utility, and "suggest an intention to establish a continuous chain of ownership in the utility . . . ." *Id.* 277a. In the CIT's view, regardless of the facts of the enrichment process and how SWU transactions are implemented, "the contracts delineate a transaction in which a utility provides raw material to an enricher, pays for the service of processing the material, and obtains the finished product after the manufacturing service has been performed." *Id.* 278a.

### C. Interlocutory Federal Circuit Decisions

On interlocutory appeal, the Federal Circuit affirmed. USEC Pet. 1a (*Eurodif I*). In evaluating what it referred to as "[t]he [c]haracterization of [e]nrichment [c]ontracts," *id.* 12a, the Federal Circuit relied on a previous decision in which it had been called upon to characterize Department of Energy enrichment contracts under a different statute, the Contract

Disputes Act, 41 U.S.C. §§ 601, *et seq.* (1988) (CDA), to determine whether interest was payable on certain judgments against the United States, *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002). In that case, the court had agreed with the government's argument that contracts for the enrichment of uranium by the Department of Energy were contracts for services, not contracts "for the disposal of personal property" and, hence, not covered by the CDA. *Id.* at 1373. The court below extended *Florida Power's* contract-based approach to this case. "In reviewing the contracts in this case, it is clear that ownership of either the natural uranium or the LEU is not meant to be vested in the enricher during the relevant time periods that the uranium is being enriched." USEC Pet. 15a. "As a result, the 'transfer of ownership' required for a sale under [*NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997)] is not present here." *Id.*

USEC and the United States then sought rehearing and rehearing *en banc*, in part based on the court's improper reliance on *Florida Power* as a basis for failing to defer to Commerce's construction of the antidumping statute. The Federal Circuit denied rehearing *en banc*, but granted rehearing for the limited purpose of addressing the applicability of *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), which had been handed down after *Eurodif I*. USEC Pet. 24a (*Eurodif II*). While acknowledging that, under *Brand X*, deference would be due to Commerce if the antidumping statute were ambiguous, the court stated, "We now clarify . . . that the antidumping statute unambiguously applies to the sale of goods and not services." *Id.* 28a.

### D. Subsequent Proceedings

On remand, Commerce adopted language limiting the scope of the French antidumping order in accordance with the Federal Circuit's decision. USEC Pet. 340a. The CIT affirmed. *Id.* 356a. The United States and USEC appealed to the Federal Circuit, raising certain issues in connection with the changes in the scope of the order. The Federal Circuit concluded that both appeals raised issues that could best be resolved when particular facts were at issue, and dismissed them as unripe. *Id.* 31a.

With the Federal Circuit's dismissal of the appeals, the Federal Circuit's interlocutory decisions in *Eurodif I* and *Eurodif II* became incorporated in a final judgment. Both USEC and the United States filed petitions for certiorari. The Court granted review on April 21, 2008, and consolidated the cases.

### E. Proceedings Regarding Imports of Russian LEU

As noted in USEC's petition, the impact of the Federal Circuit's decision is already being felt in another important antidumping case involving uranium imports from Russia. USEC Pet. at 16-17, 19, 33-35. Those imports are currently limited by a 1992 agreement between the United States and Russia suspending an antidumping investigation. The agreement limits Russian exports of commercially produced LEU. Those limits are essential in encouraging Russia to fulfill a related 1993 disarmament agreement. Pursuant to that 1993 agreement, Russia is dismantling 20,000 nuclear weapons of the former Soviet Union, down-blending the

HEU in those weapons to LEU, and then exporting the LEU to the United States. Imports of this form of Russian LEU are permitted by the 1992 suspension agreement. USEC acts as Executive Agent for the United States in compensating Russia and supplying that LEU to U.S. customers under their EUP and SWU contracts with USEC. If Russia can use its sizable enrichment facilities to manufacture and export commercial LEU under SWU contracts outside the scope of the antidumping law, it will have little incentive to deliver LEU created by the down-blending of nuclear weapons.

In late 2007, and in light of the Federal Circuit's decisions in *Eurodif*, the CIT directed Commerce to exclude imports pursuant to SWU contracts from the scope of that case. *Techsnabexport v. United States*, 515 F. Supp. 2d 1363 (Ct. Int'l Trade 2007). If such a decision were implemented, the limits on Russian commercial LEU under the 1992 agreement would no longer be effective. On June 10, 2008, the CIT stayed further proceedings in that case pending the outcome of this Court's review of the *Eurodif* decision.

## SUMMARY OF ARGUMENT

We begin with a point of common ground: all parties to this case acknowledge that the antidumping statute applies to an import transaction in which a foreign enricher takes its own uranium feedstock, manufactures it into LEU, and then delivers the LEU to a U.S. utility in exchange for cash. If, in that kind of transaction (known as an EUP transaction), the price paid is less than fair value, then it is precisely the sort of unfair

import practice that the statute was meant to address. By virtue of the transaction, "merchandise" (LEU) "is being . . . sold" by the enricher to the utility at a price that does not reflect its fair value, thereby exposing domestic competitors to the potential loss of business, and attendant loss of jobs, that result from artificially skewed competitive conditions. *See, e.g., Koyo Seiko Co. v. United States*, 20 F.3d 1156, 1159 (Fed. Cir. 1994).

From that starting point, the Commerce Department has determined that the application of the antidumping law should be no different when a utility obtains LEU in a transaction pursuant to a SWU contract, which differs factually from an EUP transaction in one primary respect: in a SWU transaction the customer must supply unenriched uranium to the enricher, as well as cash. The Department recognized that, insofar as the objectives of the antidumping act are concerned, the two transactions are essentially the same. In each situation, the parties enter into a course of dealing by which the enricher delivers, and the utility receives, "merchandise" (LEU). And, most pointedly, unfairly priced imports of LEU under either form of contract can injure the domestic industry (here, USEC, currently the sole domestic producer of LEU) that competes with the foreign producers.

Focusing on the language and purpose of the antidumping statute and the realities of the transactions, the Department concluded that SWU transactions constitute sales of merchandise under that statute. It relied on two essential elements of SWU transactions that are also pertinent to EUP

transactions: (1) the enricher produces and delivers to the customer a new, substantially transformed product (LEU); and (2) the LEU is produced from fungible, commingled raw materials and not from the feedstock actually supplied by the customer.

Refusing to accord deference to the Department under *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), however, the Federal Circuit held that the agency's construction of the statutory language was impermissible. According to the court of appeals, merchandise is only "sold" when there is a "transfer of ownership," and, as the parties to SWU transactions have structured their contracts, no "transfer of ownership" in the relevant merchandise (LEU) ever takes place. It thus decided that the Department had failed the first part of the *Chevron* test because its interpretation was foreclosed by unambiguous language in the statute.

This analysis is faulty on several grounds. To begin with, the Department, in the exercise of its assigned responsibilities under the antidumping act, was not required to adopt the common commercial definition of the word "sold," but could properly read the term more expansively in light of the statutory context. *See, e.g., Dist. Of Columbia v. Carter*, 409 U.S. 418, 420 (1973). Moreover, even if the definition used by the Federal Circuit is controlling, that language would not foreclose the Department from finding that, based on the facts of the parties' actual dealings rather than their contractual arrangements, a "transfer of ownership" in the LEU occurs. Under either view of the word "sold," therefore, Congress has not "unambiguously forbid[den] the

Agency's interpretation," *Barnhart v. Walton*, 535 U.S. 212, 218 (2002), and the interpretation must be upheld unless it, "for other reasons, exceeds the bounds of the permissible." *Id.*

The Department's interpretation readily meets that standard. It was entirely reasonable for the Department to conclude that, for purposes of the Act, the enricher in a SWU transaction "sells" the LEU that it delivers, just as it does when it delivers LEU in a EUP transaction. It is undisputed that, in both SWU and EUP transactions, the enricher does not make LEU from any particular feedstock but instead produces LEU from its fungible feedstock inventory. As a result, it is just a "legal fiction," USEC Pet. 27a, that the utility ever "owns" the specific feedstock actually used in producing the LEU that it ultimately receives. The Department was not bound to observe that "fiction," or to give it controlling effect (as the court of appeals did).

Indeed, the link between any fungible, non-identifiable feedstock and the final LEU merchandise is made even more attenuated by the fact that the feedstock must be "substantially transformed" in order to become LEU. Thus, the delivered LEU is not just an improved or "serviced" version of the feedstock which is then returned to the customer—like a suit given a dry cleaning—but rather reflects the production of an entirely new article of merchandise. As it does in an EUP transaction, the enricher in a SWU transaction draws upon a fungible inventory of unenriched uranium and creates a new product that it subsequently transfers for consideration. Nothing about the fact that, in a SWU transaction, the utility at some point contributes to the

enricher's undifferentiated inventory of feedstock, requires that the final step, *i.e.*, the transfer of LEU to the utility, be treated differently as a matter of law under the antidumping statute. Indeed, Commerce's focus on the fact that enrichers substantially transform uranium feedstock into new and different merchandise effectuates the purpose of the antidumping law—to protect domestic producers from imports of foreign-produced goods at unfair prices.

The court below refused to defer to Commerce's construction of the statute because it gave conclusive effect to the provision in SWU contracts that the utility customer retains title to the unenriched uranium it delivers to the enricher. It is well-established, however, that, in applying regulatory statutes, federal courts and agencies are not bound by either the form given by the parties to their transactions or the treatment of those transactions for purposes of commercial law. *See, e.g.*, *United Gas Improvement Co. v. Cont'l Oil Co.*, 381 U.S. 392, 399-400 (1965). Indeed, with respect to the antidumping statute itself, Congress made clear in 1984 that whether title to imported merchandise is retained by the foreign producer in a transaction structured as a lease is not determinative of whether foreign merchandise "is being . . . sold" for purposes of the Act. The Department simply followed those principles in concluding that, the parties' arrangements about title notwithstanding, the transactions in question here constituted sales of merchandise.

The Department's interpretation also avoids an undesirable loophole in the antidumping law. If the Federal Circuit were correct that the parties' contractual

arrangements controlled whether merchandise is "sold" under the statute, it would allow foreign producers and domestic consumers to draft contracts that, without materially changing the substance of their dealings, converted sales of goods into sales of services instead. The Department reasonably blocked off that potential loophole, and the Federal Circuit exceeded its judicial authority in setting that determination aside.

## ARGUMENT

### I. THE COMMERCE DEPARTMENT IS THE EXPERT AGENCY CHARGED WITH ADMINISTERING THE ANTIDUMPING LAW, AND ITS INTERPRETATIONS ARE ENTITLED TO DEFERENCE UNLESS THEY ARE FORECLOSED BY THE STATUTE OR OTHERWISE IMPERMISSIBLE.

This Court has stated that "'[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Where Congress has not "directly spoken to the precise question at issue," *id.* at 842, a court must defer to a "permissible construction of the statute" by the agency. *Id.* at 843 (citation omitted). As this Court reaffirmed in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), "[i]f a statute is ambiguous, and if the implementing agency's

construction is reasonable, *Chevron* requires a federal court to accept the agency's construction . . . even if the agency's reading differs from what the court believes is the best statutory interpretation." *Id.* at 980. "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844.

The Court has explained that this judicial deference rests upon several important understandings. In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the Court stated that "[w]e accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left an ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id.* at 740-41; *see also Brand X Internet Servs.*, 545 U.S. at 982 ("*Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps."). The Court has also remarked that "judgments about the way the real world works . . . are precisely the kind that agencies are better equipped to make than courts," *PBGC v. LTV Corp.*, 496 U.S. 633, 651 (1990), adding that "practical agency expertise is one of the principal justifications behind *Chevron* deference." *Id.* at 651-52 (citing *Chevron*, 467 U.S. at 865).

For its interpretations to receive *Chevron* deference, of course, the agency must be construing a "statute which it administers," *Chevron*, 467 U.S. at 842, but that is plainly the case here. Section 1673, by its terms, looks to whether "(1) the administering authority [*i.e.*, the

Department of Commerce under 19 U.S.C. § 1677(1)] determines that . . . foreign merchandise is being, or is likely to be sold in the United States at less than its fair value." Carrying out that responsibility, the Commerce Department engages in dozens of antidumping proceedings annually, in which it is called upon to apply that law to myriad complex transactions for the production and importation of foreign-produced merchandise. "Commerce's special expertise makes it the 'master' of the anti-dumping law, entitling its decisions to great deference from the courts." *F.lli Filippo S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

This Court has also made clear that *Chevron* deference applies to constructions of statutory provisions developed by an agency in adjudications, as it does when the construction is adopted in rulemaking proceedings. *United States v. Mead Corp.*, 533 U.S. 218 (2001). Following that principle, the Federal Circuit has acknowledged that interpretations of the antidumping statute rendered by the Commerce Department in its antidumping investigations are entitled to *Chevron* deference. *See, e.g., Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372 (Fed. Cir. 2001). There, the court of appeals stated:

> The Supreme Court's recent decision in *Mead* does not change our obligation to afford *Chevron* deference to Commerce's interpretations of ambiguous statutory terms articulated in the course of Commerce's antidumping determinations . . . . The antidumping proceedings conducted by Commerce may of course be fairly

> characterized as 'relatively formal administrative procedure[s] that adjudicate parties' rights. *Mead*, 533 U.S. at __, 121 S. Ct. at 2172.

*Id.* 1380-82 (alteration in original).

The Department reached its conclusion here in an on-the-record proceeding in the investigation of USEC's antidumping petition, and devoted a specific and separate segment of that proceeding solely to the issue. The Department issued three determinations that addressed that issue—a preliminary and final determination, and then a further decision after remand from the CIT.

The Department's application of the antidumping law to SWU transactions is thus entitled to deference unless the statute "unambiguously forbids" the agency's interpretation, *Barnhart v. Walton*, 535 U.S. 212, 218 (2002), or the interpretation, "for other reasons, exceeds the bounds of the permissible." *Id.* As we discuss in the following sections, the Federal Circuit was plainly wrong to set it aside.

## II. THE ANTIDUMPING LAW DOES NOT UNAMBIGUOUSLY FORECLOSE COMMERCE'S CONCLUSION THAT MERCHANDISE IS BEING SOLD IN SWU TRANSACTIONS.

The Federal Circuit found that the Commerce Department's interpretation of the antidumping law ran aground on the first step of the *Chevron* test because, in the court of appeals' view, the word "sold" requires that a "transfer of ownership" take place, and, given

the title-retention provision in the parties' contracts, no such transfer occurs in SWU transactions. But two necessary assumptions underlie this conclusion: *first*, that the Department was required to use a standard commercial definition of "sold," rather than permitted to read the term in light of its statutory context; and *second*, that, even if the term "sold" requires a "transfer of ownership," the Department could not look to the factual realities of SWU transactions—that the enricher takes fungible, undifferentiated feedstock from its inventory and substantially transforms it into a new article of merchandise for delivery to the utility customer, just as it does in an EUP transaction. Instead, the Federal Circuit held that Commerce had to accept, as determinative of whether a transfer had taken place, the parties' contract provision that the customer retains title to the unenriched uranium. Neither assumption is correct.

### A. The Department Could Properly Construe The Term "Sold" in Light of the Statutory Context.

The first point is simply that the term "sold," as used in a regulatory statute such as the antidumping law, is not as unambiguous as the Federal Circuit thought it was. The Federal Circuit, relying on one of its prior cases, derived its definition of "sold" primarily from a standard dictionary, *see* USEC Pet. 13a (citing *NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir. 1997) (looking to the 1986 edition of *Webster's New International Dictionary*). This Court, however, has emphasized that,

"[i]n making the threshold determination under *Chevron*, 'a reviewing court should not confine itself to examining a statutory provision in isolation.' *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 132, 120 S. Ct. 129, 146 L.E.2d 121 (2000). Rather, '[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context . . . .'" *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (quoting *Brown & Williamson* 529 U.S. at 132-33) (further citation omitted). As the Court observed, "'[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Id.* (quoting *Brown & Williamson*, 529 U.S. at 133 (further internal quotation marks and citation omitted)). *See also Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1546 (2007) ("[S]tatutory '[a]mbiguity is a creature not [just] of definitional possibilities but [also] of statutory context.'") (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)) (**alteration in original**).

This Court has also pointed out that part of the relevant statutory context is the objective that Congress, in setting forth particular statutory language, intends to achieve. Although neither a court nor an agency can just pursue an underlying purpose regardless of the actual words of the statute, *see Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79-80 (1998), it is a familiar principle that statutory terms must be interpreted in accordance with the "'provisions of the whole law, and . . . its object and policy.'" *United States*

*Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1849)); *see also Dada v. Mukasey*, 128 S. Ct. 2307, 2317 (2008). As this Court has observed:

> [W]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at, not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.

*Dist. of Columbia v. Carter*, 409 U.S. 418, 420 (1973) (quoting *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 258 (1937)).

This Court has followed that principle in construing the term "sale" in other statutory contexts. For example, this Court has found that the words "sale" and "purchase" in the Securities Exchange Act of 1934 should draw their meaning from the statutory setting, stating that "[w]hatever the terms 'purchase' and 'sale' may mean in other contexts . . . [t]he broad anti-fraud purposes of the statute and [related] rule would clearly be furthered by their application to this type of situation." *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 467 (1969). Similarly, this Court has found that the phrase "sale in interstate commerce of natural gas" in the Natural Gas Act applies to transactions in which the

pipeline company did not purchase natural gas, but rather leased gas fields and arranged for another company to produce gas from the leased fields. *United Gas Improvement Co. v. Cont'l Oil Co.*, 381 U.S. 392, 399-400 (1965). The Court noted that "[a] regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of [sale in] local law." *Id.* at 400; *see also Gray v. Powell*, 314 U.S. 402, 403, 416 (1941) (railroad's consumption of coal from its own leased lands constitutes a "sale or other disposal" of coal for purposes of price control provisions of Bituminous Coal Act).

Here, Congress has enacted the antidumping law to address a particular concern: the threat to domestic producers posed by unfairly traded goods produced abroad. As the Federal Circuit has said, "[t]he purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value." *Koyo Seiko Co. v. United States*, 20 F.3d 1156, 1159 (Fed. Cir. 1994); *see also Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1379 (Fed. Cir. 2003) (purpose of the antidumping law is to "equalize competitive conditions between foreign exporters and domestic industries affected by dumping").

The goal of protecting domestic producers of goods from foreign-produced goods that are unfairly traded was identified from the outset of the statute's consideration and through amendments to the statute enacted over the years. The relevant provision of the current antidumping statute traces its roots to the Antidumping Act of 1921, 42 Stat. 11, a post-war era

when Congress was facing the prospect that surplus goods in Europe would be dumped on world markets and "U.S. industries that were important for national security might be damaged."[4] The House Committee Report observed that the proposed law "protects our industries and labor against a now common species of commercial warfare of dumping goods on our markets at less than cost or home value . . . ." H.R. Rep. No. 67-1, at 23 (1921). A half century later, as Congress was in the process of amending the law, the House Report reiterated the same broad objective: "The bill recognizes that . . . those domestic statutes which endeavor to protect our producers from disruptive market penetrations and unfair trade practices must be made more effective if our domestic producing interests are to have confidence in their ability to survive competitively in the United States." *See* H.R. Rep. No. 93-571, at 3 (1973).

Given this purpose of the antidumping law, it is appropriate to believe that Congress, rather than insisting on a narrow definition of the word "sold," desired the Department to possess discretion to apply the statute to injurious import transactions that have the usual characteristics of a sale, even if they do not involve a "transfer of ownership" in the strictest sense. That commonsense view is strongly reinforced by the fact that Congress itself, in a 1984 amendment to 19 U.S.C. § 1673 (Pub. L. No. 98-573, § 602, 98 Stat. 3024),

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[4] *How the GATT Affects U.S. Antidumping and Countervailing-Duty Policy*, Cong. Budget Office 21 (Sept. 1994) (describing history of the antidumping statute and worldwide concerns about dumping between 1920 and 1922).

made clear that the retention of title in transactions involving imported merchandise does not necessarily negate a finding that the transaction involves a sale of merchandise. In that amendment, Congress declared that, "[f]or purposes of this section . . . a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise *that is equivalent to the sale* of the merchandise." *Id.* (emphasis added). Thus, even though the hallmark of a lease contract is the lessor's retention of title to the property, the wording of the statute explicitly covers a lease transaction that is "equivalent" to a sale of merchandise. It is therefore evident that Congress was concerned, not just with "sales" in the narrowest sense, but (as the statutory language shows) transactions that are "equivalent to [a] sale" as well.[5]

### B. The Department Could Properly Determine That The Transactions Here Involved A Transfer Of Ownership.

Even if the Federal Circuit was correct that merchandise is not "sold" unless there is a "transfer of

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[5] The available evidence indicates that Congress did not view this amendment as a modification to the scope of the antidumping statute, but simply as an explication of its coverage. In form, the amendment explains the meaning of an existing term, rather than expands the coverage. *See* 19 U.S.C. § 1673 ("a reference to the sale of foreign merchandise includes . . ."). The legislative history confirms this reading. *See* H.R. Rep. No. 98-725, at 11 (1984) ("The addition of language regarding leases is intended to clarify the applicability of both laws [the antidumping statute and the countervailing duty statute] to sham leases or leases which are tantamount to sales."), *reprinted in* 1984 U.S.C.C.A.N. 5127, 5138.

ownership," it was wrong to conclude that the Department, in deciding whether such a transfer takes place, is bound to accept the parties' contract provision for the retention of title. Put another way, the term "sold" does not unambiguously bar the Department from exercising its expert judgment—provided, of course, that it is reasonable—to find that the parties' actual course of dealings amounted to a transfer of ownership for purposes of the Act. Rather, in carrying out its duties, the Department may properly look to the substance of a transaction, not just the contract provisions.

This Court has repeatedly recognized that federal courts (and agencies) are not necessarily bound by the form in which parties cast their transactions. For example, in deciding whether a particular instrument falls within the term "security" for purposes of applying the securities laws, the Court has said that "form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Similarly, with respect to tax matters, the Court has observed that various classifications "turn on 'the objective economic realities of a transaction rather than . . . the particular form that the parties employed' . . . ." *Boulware v. United States*, 128 S. Ct. 1168, 1175 (2008) (quoting *Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1978)). The same is true for laws, like the antidumping act, that protect fair competition. *See, e.g., United States v. Sealy, Inc.*, 388 U.S. 350, 352 (1967) (discussing Section 1 of the Sherman Act) ("[I]f we look at substance rather than form, there is little room for debate . . . . These must be classified as horizontal restraints.").

Nor has this Court allowed technicalities of title to control the reach of federal statutes. In *United Gas Improvement Co.*, 381 U.S. at 392-400, the Court concluded that a transfer of title was not essential to a "sale" under the Natural Gas Act. *See also Gray v. Powell*, 314 U.S. 402 (1941) (rejecting reliance on title in determining the scope of that Act's protection). Likewise, in tax cases, this Court has rejected giving dispositive weight to title, *Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1978), refusing to permit the transfer of formal legal title to shift the incidence of taxation attributable to ownership of property where the transferor continued to retain significant control over the property transferred. *See also Corliss v. Bowers*, 281 U.S. 376, 378 (1930) ("[T]axation is not so much concerned with the refinements of title as it is with actual command over the property taxed . . . ."). In keeping with these principles, the Second Circuit has remarked that, "where the public interests or the rights of third parties are involved, the relationship between contracting parties must be determined by its real character rather than by the form and color that the parties have given it." *In re Shulman Transp. Enters. Inc.*, 744 F.2d 293, 295 (2d Cir. 1984).

Indeed, in other cases, the Federal Circuit itself has acknowledged that the parties' contractual arrangements regarding title should not necessarily control the application of federal statutes. In *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002)—a case involving the categorization of Department of Energy enrichment contracts under the Contract Disputes Act—the court of appeals declined

to give effect to contract provisions that expressly transferred title to the unenriched uranium from the utility to the DOE and then transferred title to the produced LEU from the DOE to the utility. In doing so, the court specifically noted that one of its earlier decisions had treated the title transfer as nothing more than a "'technicality.'" *Id.* at 1373 (quoting *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1355 (Fed. Cir. 2001) (*en banc*)). But, just as a transfer of title can be treated as a technicality, so can provisions deeming title to remain continuous when the course of dealings indicates that, in substance, it does not.

It is true that, in *Florida Power*, the Federal Circuit ultimately concluded that the DOE enrichment contracts before it did not involve "the disposal of personal property" within the meaning of the Contract Disputes Act. *See* 41 U.S.C. § 602(a)(4). But that decision is not instructive here for several reasons. First of all, the Contract Disputes Act and the antidumping law are different statutes with vastly different objectives, making it difficult to extrapolate interpretive principles from one to the other. Even more importantly, however, the *Florida Power* case did not involve any construction of a statute by an expert government agency charged with its implementation. As a result, the Federal Circuit necessarily undertook to resolve the "disposition of personal property" question on the basis of its own judgment, without any need to consider the scope of deference to a different agency interpretation.

It is thus significant for present purposes that, while it decided that no "disposition" of property had occurred,

the court of appeals confessed that it found the question a close one. Believing that a transaction in which the enricher makes LEU from feedstock supplied by a third party would be a "disposition" and that a transaction in which the enricher makes LEU from the very feedstock supplied by the utility would not, the court found that the DOE enrichment contracts before it "do[ ] not fall neatly into either of the above categories . . . ." *Florida Power*, 307 F.3d at 1373. But that is a critical observation. It is in just such cases of uncertain "characterization" that agency discretion should be at its zenith, and judicial displacement of agency judgments at its lowest point. Unless it is clear that SWU transactions do not involve a "transfer of ownership" *in substance*—not just as viewed in light of the "technicality" of the parties own arrangements—the agency interpretation must be given controlling force.

In short, the antidumping act does not forbid the Department from concluding that LEU imported pursuant to SWU contracts is merchandise that is being "sold," regardless of whether the term is limited to a "transfer of ownership" or not. Because "Congress has not directly addressed the precise question at issue," *Chevron*, 467 U.S. at 843, the statute leaves ample room for the agency to apply its expertise. As we discuss next, it has done so in a reasonable manner.

## III. COMMERCE REASONABLY CONCLUDED THAT SWU TRANSACTIONS EFFECT A SALE OF MERCHANDISE SUBJECT TO THE ANTIDUMPING LAW.

Commerce reasonably concluded that imports of LEU pursuant to SWU contracts involve a sale of merchandise subject to the antidumping law, rather than a sale of services outside the scope of that law. In reaching this conclusion, Commerce primarily relied upon two key characteristics of SWU transactions: (1) that the enricher substantially transforms raw material (unenriched uranium), into a new and different article of commerce (LEU), and (2) that, because of the fungibility of unenriched uranium, the LEU received by a customer does not derive from the same raw material it provided to the enricher. Commerce determined that, as with import transactions pursuant to EUP contracts, import transactions pursuant to SWU contracts involve the production of a new and different product that is not made from the customer's raw materials—and, hence, do not involve the rendering of a mere "service" on goods provided by the customer that are then returned to the customer. And it reasonably found that, when the enricher transfers that new product to the customer under a SWU contract, it has "sold" that product, just as it does when it transfers LEU under an EUP contract.

### A. Substantial Transformation Is The Touchstone In Trade Law For Determining When An Economic Activity Involves The Production Of A New Good.

The Commerce Department, relying on familiar principles of substantial transformation, determined that, in LEU import transactions pursuant to SWU contracts, enrichers produce and sell a new and different article of merchandise covered by the antidumping law, rather than merely providing a service on the customer's goods. In trade law, substantial transformation refers to the "degree of processing or manufacturing resulting in a new and different article," *Certain Carbon Steel Butt-Weld Pipe Fittings from India*, 60 Fed. Reg. 10,545, 10,546 (Dep't Commerce Feb. 27, 1995) (final det.), and the concept is derived from decisions of this Court applying early customs and tariff laws. In *Hartranft v. Wiegmann*, 121 U.S. 609, 615 (1887), for example, the Court held that a tariff on manufactured shells could not be imposed on shells first obtained elsewhere that were polished in England because "[t]hey had not been manufactured [in England] into a new and different article, having a distinctive name, character, or use from that of a shell." In *Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556, 562 (1908), the Court applied the same test to determine whether manufacture of the goods at issue occurred in the United States for purposes of a duty drawback statute.

In applying the antidumping law, Commerce has developed an extensive body of precedent addressing substantial transformation in various industries and circumstances. Commerce makes its decisions on a case-

specific basis,[6] considering factors such as whether the processing results in a change in chemical or physical properties;[7] whether substantial value has been added by the manufacturing or processing operation;[8] and whether the activity is capital and technology intensive.[9] The ultimate objective, as identified by the Court in *Hartranft* more than a century ago, is to determine whether the production or processing has resulted in a "new and different article."[10]

In this case, Commerce found—and no party has ever disputed—that enrichment constitutes substantial

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[6] *Steel Wire Rod from Canada*, 62 Fed. Reg. 51,572, 51,573 (Dep't Commerce Oct. 1, 1997) (prelim. det.); *Certain Carbon Steel Butt-Weld Pipe Fittings from India*, 60 Fed. Reg. at 10,546.

[7] *Steel Wire Rod from Canada*, 62 Fed. Reg. at 51,573.

[8] *Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 Fed. Reg. 37,062, 37,066 (Dep't Commerce July 9, 1993) (final det.).

[9] *3.5" Microdisks and Coated Media Thereof from Japan*, 54 Fed. Reg. 6433, 6435 (Dep't Commerce Feb. 10, 1989) (final det.).

[10] Substantial transformation plays a critical role in the baseline determination—what product is being imported from what country—that must be made in the application of virtually all regimes that govern international trade, such as the application of ordinary customs duties, countervailing duties (to offset foreign subsidies), quota limits, and free-trade agreements. *See* U.S. Customs and Border Protection Headquarters Ruling Letter HQ 563308 (dated Sept. 6, 2005) (giving examples of such regimes).

transformation of the unenriched uranium. *See* USEC Pet. 52a, 62a-63a. It determined that, regardless of the type of contract under which the LEU was imported, the enrichment process involves the manufacture of a new and different good. Commerce rejected the view of enrichment as nothing more than a "service," observing that "[w]hile the term 'enrichment services' is common in the industry, the enrichment of uranium feedstock is no more a 'service,' as that term is normally understood in the international trading community, than a production process that results in the manufacture of textiles, semiconductors, or corrosion-resistant steel." USEC Pet. 63a. It noted that, in each of those examples, a customer could provide the raw materials and merely purchase what might be called a "manufacturing service" from the producer, but concluded:

> Yet, no matter what the purchaser chooses to call the transaction, and no matter what terms may be common in the industry, nothing can change the fundamental facts associated with all of these transactions. In each of these three cases, the purchaser has contracted out for a major production process that adds significant value to the input and that results in the substantial transformation of the input product into an entirely different manufactured product.

USEC Pet. 64a.

Indeed, Commerce's use of substantial transformation, in determining when an import transaction involves a sale of merchandise rather than

a sale of a service, is consistent with the way Congress itself has drawn that line for international trade purposes. In 19 U.S.C. § 2114b(5), Congress set out a definition of "services" for purposes of legislation authorizing the United States Trade Representative to develop and coordinate the implementation of policies concerning international trade in services.[11] Congress defined "services" in § 2114b(5) as "economic activities whose outputs are other than tangible goods" and then provided examples of such activities (*e.g.*, banking, insurance, transportation). Consistent with that language, the Commerce Department concluded here: "We simply do not consider a major manufacturing process to be a 'service' in the same sense that activities such as accounting, banking, insurance, transportation and legal counsel are considered by the international trading community to be services." USEC Pet. 64a.

The reliance by the Department on principles of substantial transformation makes sense in determining when a transaction involves a sale of merchandise because it directly implicates the purpose of the antidumping law: to protect domestic producers of goods from unfairly traded imports of merchandise produced abroad. When merchandise produced abroad is sold at unfair prices and the imports displace U.S. produced goods or otherwise adversely affect the market in the United States, U.S. producers suffer the type of injury

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[11] *See* the International Trade and Investment Act, enacted as Title III of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948, 3002, 3005. The measure also amended section 301 of the Trade Act of 1974, 19 U.S.C. § 2411, to make barriers to trade in services actionable under that section.

at which the antidumping statute is directed. Thus, Commerce's focus on substantial transformation is precisely the focus that Congress had in mind in enacting the antidumping law.

### B. The Use Of Fungible Raw Materials In Producing A New Good Confirms That A Sale Of Merchandise Takes Place.

Whether or not substantial transformation by itself is enough to establish that transfer of the resulting good to the customer is a "sale" of that good, the reasonableness of treating SWU transactions as sales of merchandise is confirmed by a second element: the imported foreign merchandise is produced from fungible undifferentiated feedstock in the enricher's inventory, not from any raw material actually delivered by the customer. The Federal Circuit acknowledged that the LEU delivered to a utility is not in fact derived from the utility's own feedstock, USEC Pet. 15a, but placed great weight on contractual terms deeming it to be. But deeming does not make it so, and the Department was entitled to look at what actually happens instead.

The Commerce Department made undisputed findings on this issue. In its final determination, Commerce found that "enrichers do not use the uranium feedstock provided by the utility companies. Instead, the natural uranium is typically delivered shortly before, or even after, delivery of the LEU." USEC Pet. 49a. On remand, Commerce again found that "the record indicates that LEU delivered to a utility customer by an enricher under an enrichment contract may be produced before any natural uranium supplied by that

customer could have been part of the production process for that LEU, thereby making it impossible to conclude that the LEU produced and delivered by the enricher is in any way derived from the uranium supplied by the customer." *Id.* 219a. It emphasized that "the record shows that enrichers hold inventories of uranium from various sources, including uranium owned by the enricher itself, and produce LEU without relying solely upon the input from a particular customer." *Id.* 221a.

These findings are not incidental, but rest, in part, on the nature of enrichment. The unenriched uranium from which an enricher produces LEU is fungible with unenriched uranium supplied by other customers or provided by the enricher itself. Equally significant, it is a consequence of the enrichment process that the LEU ultimately delivered to a particular customer cannot be physically traced to the specific batch of unenriched uranium delivered by that customer. In the course of the enrichment process, molecules of $U_{235}$ are continuously recycled through hundred of cascades into a stream of gas that is enriched in $U_{235}$ and a stream that is somewhat depleted in $U_{235}$. *See* USEC Pet. 105a, 172a; J.A.-40-43.

The contracts reflect this reality. When a customer delivers unenriched uranium to an enricher under a SWU contract, the enricher is given exclusive use and possession of the uranium. *See, e.g.*, C.J.A.-87, 140-41; *see also*, USEC Pet. 105a. The enricher may commingle the customer's feedstock with other unenriched uranium to produce LEU for the enricher's other customers under SWU or EUP contracts. *See, e.g.*, C.J.A.-17. Indeed, not only may the enricher use that unenriched

uranium to produce LEU for any customer, there is no prohibition on the enricher's selling or otherwise disposing of that unenriched uranium. Moreover, the amount of unenriched uranium used in the enricher's production process will frequently be more—or less—than the customer has supplied, depending on whether the enricher is "over-feeding" or "under-feeding" its plant. *See supra* pp. 9-10.

As a consequence, the LEU created by the enricher and delivered to the customer does not in any way constitute the "return" of the customer's raw material in modified form. As Commerce pointed out, a dry cleaner provides a "service" when it returns the customer's suit cleaned, USEC Pet. 53a, but such activity involves neither fungible raw material nor the creation of a new and different article. In the circumstances here, by contrast, Commerce could reasonably conclude that an import transaction constitutes a sale of merchandise under the antidumping law when the foreign producer commingles the raw materials delivered by all of its customers (together with its own unenriched uranium) and then delivers to the customer a transformed product made from those materials.

Early decisions of this Court provide support for that view. For example, in *Powder Co. v. Burkhardt*, 97 U.S. 110 (1877), a customer provided raw material (acids and glycerin) and money to a manufacturer who in turn produced explosives for the customer. While the raw materials were with the manufacturer, they were seized by a third party in execution of a judgment. The question before the Court was whether the raw materials had been sold by the customer to the

manufacturer (and thus could be attached by the third party) or were still owned by the customer under a bailment. The Court explained the underlying law in some detail:

> It is contended that the question of bailment or not is determined by the fact whether the identical article delivered to the manufacturer is to be returned to the party making the advance. Thus, where logs are delivered to be sawed into boards, or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is said to be a sale or loan, and the title to the thing delivered vests in the manufacturer. We understand this to be a correct exposition of the law.

*Id.* at 116. In finding a sale, the Court pointed out that there was

> nothing requiring that the identical acids sent [by the customer] should be used in the manufacture of the explosives, and nothing to prevent an exchange by [the manufacturer] for other materials, if he found any of the

> articles to be unsuitable, or if he found that he had too much of one kind and too little of another, acting honestly in the interest of both parties.

*Id.* at 117-18.

Almost two decades later, in *Sturm v. Boker*, 150 U.S. 312 (1893), a unanimous Court followed the same principles. Citing to the *Powder Co.* decision, the Court explained that

> [t]he recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale.

*Id.* at 329-30.[12]

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[12] This analysis continues to be applied by courts today. *See, e.g., B.A. Ballou & Co. v. Citytrust*, 591 A.2d 126, 130 & n.4 (Conn. 1991) (quoting *Powder Co.* and concluding that no bailment occurs when a customer supplies fungible raw material to a manufacturer in circumstances where, as a result of the manufacturer's processing activities, "the identity of the item has been destroyed, its nature substantially changed, or value greatly enhanced"); *Sitkin v. R-One Alloys*, No. C.A. PB

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These decisions—which were on the books at the time that Congress enacted the antidumping law— find that a sale occurs where the customer provides raw materials that are commingled and then transformed by the manufacturer into a new good. Those same elements are present in SWU transactions, and the Commerce Department specifically relied upon them in making its determination here that a sale by the enricher occurs upon delivery of the LEU to the customer. Thus, Commerce's conclusion that a sale takes place in a SWU transaction not only implements the purposes of the antidumping law, it tracks longstanding principles recognized in the common law.

### C. The Title Retention Provision In The SWU Contracts Did Not Foreclose Commerce's Conclusion That SWU Transactions Effect A Sale Of The LEU.

The foregoing discussion demonstrates the reasonableness of Commerce's determination that delivery of LEU pursuant to SWU transactions effects a sale of LEU by the enricher to the customer, even assuming that a transfer of ownership is necessary for goods to be "sold." The Federal Court, however, assigned "critical importance" to what it viewed as the "indisputable fact" that the enricher never obtains ownership of the LEU. USEC Pet. 29a. It read the

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04-0495, 2006 WL 625273, at *4 (R.I. Super. Ct. Mar. 16, 2006) (sale occurred, irrespective of contract language, because raw material provided by customer commingled with raw material from other customers and transformed into new product).

provision in the SWU contracts that the customer retains title to the unenriched uranium it provided as conclusively determining that any LEU ultimately delivered by the enricher was continuously owned by the customer. To reach this conclusion, the court implicitly accepted the "legal fiction"—as it was characterized by the CIT—that the LEU delivered to a customer is produced from the unenriched uranium provided by the customer.

The record in this case demonstrates the complete unreality of that legal fiction. It shows that an enricher may produce and deliver LEU to a customer under a SWU contract *even before* the customer has supplied the unenriched uranium, USEC Pet. 49a, 219a. The enricher may also fulfill its obligation by delivering LEU produced by *another* enricher. J.A.-229. In each of these cases, there is no factual grounding to the notion that the LEU delivered by the enricher derives in any way from the raw uranium furnished by the customer. Yet it is solely on the basis of that notion that the Federal Circuit found U.S. antidumping law inapplicable to LEU imports pursuant to SWU contracts.

The Department chose to reject that fiction, looking instead to the real nature of the manufacturing process. It pointed out that the "customer does not hold title to the LEU, nor does she hold title to the feed material contained within the recently produced LEU because the LEU produced by the enricher cannot be identified as having been derived from the feedstock provided by any particular customer." *Id.* 219a. As a result, "between the time in which the LEU is produced and the time in which it is delivered as specified under the contract, the

enricher holds title and holds ownership in the complete LEU product." *Id.* Enrichers, in short, "own the LEU, including the rights to sell the LEU to any buyer . . . [and] make a relevant sale when they transfer ownership of the complete LEU to the utilities through the delivery of such merchandise for consideration." *Id.* 219a-220a.[13]

There is nothing exceptional about these agency findings. Although it is true that the Department chose not to give decisive weight to the title-retention provision in the SWU contracts, that refusal is fully consistent with decisions of this Court holding that the parties' arrangements with regard to title are not conclusive for purposes of applying federal regulatory laws. *See supra* pp. 34-35. Indeed, were the rule otherwise, it would lead to the unacceptable result that the parties' agreement regarding the nature of their transaction could conclusively bind agencies and courts as to how the transaction should be characterized under a regulatory statute. *See United Gas Improvement*, 381 U.S. at 399-400; *SEC v. W.J. Howey*, 328 U.S. 293 (1946) (concluding that a

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[13] Eurodif's customary practice is to ship the LEU to the fabricator in the United States and then to deliver the LEU to the customer by directing the fabricator to transfer the requisite amount of LEU from Eurodif's account to the account of the utility customer. *Supra* p. 11. USEC Pet. 230a, C.J.A.-475, 505 (other relevant provisions in contracts with fabricators). Until it delivers the LEU to a particular customer, the LEU is not identified to any particular utility contract, and the enricher is free to deliver the LEU to any customer or dispose of it in its discretion. Thus, in reality, the enricher, as opposed to any particular customer, owns the undelivered LEU, as Commerce found.

transaction structured as a sale of real estate and services could instead be viewed by the agency as a sale of an investment contract).

Moreover, even in the commercial context, courts often give only limited effect to title retention provisions, particularly as they may affect the rights of third parties. Thus, for example, when title retention provisions are used in processing or contract manufacturing transactions, some courts have held that a sale to the processor, or the acquisition of ownership rights by the processor, has nevertheless taken place so as to protect the processor's creditors. *See Morton Booth Co. v. Tiara Furniture Inc.*, 564 P.2d 210 (Okla. 1977) (finding sale of goods when goods sent to processor, despite supplier's retention of title in goods, because title retention provision merely established security interest in goods); *Kinetics Tech. Int'l Corp. v. Fourth Nat'l Bank*, 705 F.2d 396, 400-402 (10th Cir. 1983) (same); *In re Bristol Indus.*, No. 1-81-01028, 1981 WL 138044 (Bankr. D. Conn. Dec. 14, 1981) (finding retention of title was evidence only of a "security device" rather than a bailment and finding a sale of goods in processing context), *rev'd on other grounds*, 690 F.2d 26 (2d Cir. 1982). *See also* William D. Harrington, *A Caveat for Commodity Processing Industries: Insolvent Processors' Creditors vs. Putative Owners of Raw Materials*, 16 UCC L.J. 322 (1984).[14]

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[14] The same emphasis on substance may be found in the area of mortgage financing, where the person who holds title to real property may not be the real "owner." While many states use liens to secure financing, a minority still follow early English common law and provide that a homeowner provides

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As discussed above, *supra* pp. 32-33, in its 1984 amendment to the antidumping statute, Congress itself made clear that the retention of title to goods in a lease is not determinative of whether the transaction should be treated by Commerce as a sale of goods for purposes of the antidumping law. In 1988, Congress took the further step of identifying the factors, in addition to the terms of the lease itself, that Commerce should consider in determining whether a particular lease was equivalent to a sale. Those factors include "commercial practice within the industry," "the circumstances of the transaction," and "other relevant factors, including whether the lease transaction would permit avoidance of antidumping or countervailing duties." *See* 19 U.S.C. § 1677(19). In this case, Commerce considered those same factors in concluding that SWU transactions constitute a sale of merchandise despite the title retention provisions in the parties' SWU contracts.[15]

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security for the mortgage by transferring title to the lender, to a nominee of the lender, or to a trustee designated by the lender. *See Powell on Real Property* § 37.03 (Michael Allan Wolf ed., 2000). In these "title theory" states, which include Virginia, the District of Columbia, and Maryland, the lender or trustee under a deed of trust holds the title as security for the repayment of the loan. "Today . . . title jurisdictions differ in only a few respects from their lien theory counterparts. Such states recognize that mortgagees hold title for security purposes only, and for both practical and theoretical purposes they usually view the mortgagor as the owner of the land." Restatement (Third) of Property (Mortgages) § 4.1 cmt. a, at 185 (1997).

[15] The 1984 amendment to § 1673 was consistent with case law disregarding title-retention provisions in determining that
(Cont'd)

The view taken by the Department does not mean, of course, that the parties' contractual treatment of title is irrelevant in all contexts. Their private arrangement may serve various purposes, such as determining their rights vis-a-vis each other, allocating the obligation to pay property taxes on the unenriched uranium, or securing the performance of the other party's obligations. Here, for example, the customer's retention of title to the quantity of feed material that it delivers secures the performance of the enricher in delivering the LEU. But such provisions do not necessarily determine where ownership of the property may lie—and certainly not where the rights of third parties or the public may be at stake.

It is also evident that blind reliance on a contract provision about who holds "title" to the unenriched uranium would lead to results that are clearly contrary to the proper administration of the antidumping law. For example, it would mean that a utility could simply purchase unenriched uranium from the enricher's own inventory via a book transfer, immediately "provide" it to the enricher to fulfill its obligations under a SWU contract, and then claim that it had continuously "owned" the LEU delivered to it. Alternatively, to meet its obligations under the SWU contract, a utility could ask the enricher to purchase uranium on its behalf but

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(Cont'd)

a transaction was in reality a sale, not a true lease. *See, e.g., Citi-Lease Co. v. Entm't Family Style, Inc.*, 825 F.2d 1497, 1500-01 (11th Cir. 1987) (rejecting a title-retention provision as determinative of whether the transaction was a lease); *Orix Credit Alliance, Inc. v. Pappas*, 946 F.2d 1258, 1263 (7th Cir. 1991) (same).

to maintain title in the utility. Indeed, even an EUP contract could be converted into a sale of services just by deeming the customer to have "title" to the raw materials used by the enricher in producing the LEU.

The problem, in fact, would go well beyond the particular circumstances of producing enriched uranium. Foreign producers and their U.S. customers could potentially restructure any transaction for the sale of merchandise into a sale of the raw materials and a sale of the production of the finished product. So long as the contracts provided that title to the raw material remained with the customer, they could assert that the contract for the production of the finished merchandise is only a contract for the sale of services outside the antidumping law. In effect, the parties' own contract provisions would determine the scope of the law.

These undesirable consequences would all arise from a rule that a title-retention provision with regard to fungible raw materials provided by a customer conclusively dictates that the customer, not the manufacturer, owns the finished product prior to its delivery to the customer. Commerce, in applying the antidumping statute, was clearly not compelled to adopt this view of that provision or to adopt the "legal fiction" that the courts below derived from it. Its judgment thus was reasonable and should have received deference.

## IV. THIS CASE ILLUSTRATES WHY COMMERCE'S CONSTRUCTION ADVANCES THE PURPOSES OF THE ANTIDUMPING LAW.

If the antidumping law is not given the construction provided by Commerce, it will fail to achieve its basic purpose of protecting U.S. manufacturing industries from the threat of unfair foreign competition. The nature and vital importance of that risk are vividly illustrated by the facts of this case.

USEC, created through privatization of an arm of the U.S. government, is the sole domestic entity that produces enriched uranium. It is also the only entity that employs U.S. enrichment technology, free of restrictions that encumber all other available sources of enriched uranium for the military needs of the United States. Petition of the United States at 30-31. Today, USEC is the sole supplier of LEU used to fuel the government-owned nuclear reactors that produce tritium, a radioactive isotope necessary to maintain the U.S. nuclear arsenal. In the future, as current stocks of highly enriched uranium needed for the U.S. Navy's nuclear-powered submarines and aircraft carriers are depleted, the Defense Department will need a domestic source of enriched uranium produced with U.S. technology to supply its needs. *Id.* Today, and for the indefinite future, USEC is the only domestic company that employs uranium enrichment technologies available to meet U.S. defense needs.

Unfair import competition can cause great economic injury in the enrichment industry. The number of customers for enriched uranium is limited. Where a

foreign entity, perhaps one owned by a foreign government, dumps enriched uranium in the United States, a domestic enricher like USEC faces great difficulties in selling its product. It faces either a loss of sales or a decline in price or both.

The International Trade Commission has found that imports of LEU from France have caused, or threaten to cause, material injury to the domestic enrichment industry.[16] Indeed, the threat to USEC is even more dire than the prospect of unlimited imports of French LEU under SWU contracts. Imports of LEU from Russia are currently limited because of a 1992 agreement arising out of an antidumping case against Russian uranium products. The CIT has insisted that the holding of the Federal Circuit in this case, exempting French SWU transactions from the coverage of the antidumping law, must also be applied with respect to imports of LEU from Russia pursuant to SWU transactions. *Supra* pp. 18-19.

This prospect greatly expands the potential for injury to USEC and any future domestic enrichment

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[16] In December 2007, the Commission, in its five-year updated review of its original injury determination, concluded that, "if the order on LEU from France were to be revoked, the likely significant increase in the volume of subject imports, coupled with the likely adverse price effects, would likely have a significant negative impact on the domestic industry in terms of output, sales, market share, profits, productivity, return on investments, utilization of capacity, cash flow, inventories, employment, wage growth, ability to raise capital, [and] investment . . . ." *Low Enriched Uranium From France*, Inv. No. 731-TA-909 (Review), USITC Pub. No. 3967, at 33 (Dec. 2007), *available at* http://hotdocs.usitc.gov/docs/pubs/ 701_731/ pub3967.pdf.

company. Russia is the largest enricher of uranium in the world, it has substantially more enrichment capacity than is necessary to supply its own domestic market, and, absent constraints imposed by the antidumping law, it would likely target the U.S. market with significant volumes of LEU. *See Uranium From Russia*, Inv. No. 731-TA-539-C (Second Review), USITC Pub. No. 3872, at IV-16, 28 (Aug. 2006) ("*Uranium From Russia*").[17] The impact on the U.S. enrichment industry resulting from the absence of such constraints would essentially be the same as if the suspension agreement were terminated. The International Trade Commission concluded that the termination of the suspension agreement would likely lead to a "significant increase" in "aggressively priced" LEU imports from Russia that would "significantly depress or suppress the domestic industry's prices. . . . We find that these developments would likely have a significant adverse impact on the production, shipments, sales, market share, and revenues of the domestic industry, particularly given its vulnerable condition." *Id.* at 34.[18]

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[17] The report is *available at* http://hotdocs.usitc.gov/ docs/ pubs/701_731/pub3872.pdf.

[18] As discussed more fully in the petitions of the United States and USEC, the market distortions created by a loophole in U.S. antidumping laws would not only create an incentive for the Russians to flood the U.S. market with their commercial uranium, but would also discourage them from dismantling the nuclear arsenal of the former Soviet Union through the relatively more expensive process of down-blending their weapons-grade uranium. United States Pet. 25-30; USEC Pet. at 33-35.

The threat of significant imports of Russian LEU under SWU contracts outside the scope of antidumping discipline could not only undermine USEC's plans to create new enrichment capacity in the United States, but could well undermine or limit the plans for other new enrichment plants. USEC has announced plans to build a new multi-billion dollar enrichment plan under its 2002 Memorandum of Understanding with the United States Department of Energy. Another entity, known as "LES", is also building an enrichment facility in New Mexico (using European, not U.S., technology). Removal of the restrictions that the antidumping law provides against unfairly priced LEU imports could undermine both endeavors, by making it difficult to sell their output or raise capital.[19]

Thus, in the absence of effective enforcement of the antidumping laws, an industry vital to the defense of the nation, the U.S. uranium enrichment industry, faces a serious threat from foreign imports of LEU. It was precisely to avoid threats of that kind that Congress, almost a century ago, enacted the antidumping law. *Supra* pp. 32-33. Congress has placed the Commerce Department in the pivotal role of applying the antidumping law, and the Federal Circuit has recognized that Commerce is the "master" of that law. *Supra* p. 27. Where, as here, Commerce reaches a

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[19] *Uranium From Russia* at 34 ("The likely significant volume of imports from Russia at aggressive prices would also threaten the viability of the two new enrichment facilities being planned in the United States, USEC's 'American Centrifuge' facility and LES's 'National Enrichment Facility,' without at least one of which the U.S. industry will be increasingly marginalized by its old and uneconomic technology.").

construction that is consistent with the language of the antidumping law, will facilitate the purposes of that law, and is entirely reasonable in light of the economic realities of the transactions, that construction should govern.

## CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Federal Circuit should be reversed.

Respectfully submitted,

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Nos. 07-1059 & 07-1078

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IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,
*Petitioner,*

*v.*

EURODIF S.A., *et al.*,
*Respondents.*

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USEC, INC., *et al.*,
*Petitioners,*

*v.*

EURODIF S.A., *et al.*,
*Respondents.*

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ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## BRIEF FOR RESPONDENT THE AD HOC UTILITIES GROUP

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## QUESTION PRESENTED

Whether the court of appeals was correct in holding that under the plain language of the antidumping statute, 19 U.S.C. § 1673, contracts for the sale of uranium enrichment services are not sales of merchandise, and therefore such sales are not subject to the statute.

## RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the members of the Ad Hoc Utilities Group joining in this Brief in Opposition list their respective parent companies and nonwholly owned publicly traded subsidiaries as follows:

1. The parent company of Arizona Public Service Company is Pinnacle West Capital Corporation. Arizona Public Service Company has no publicly-traded nonwholly owned subsidiaries.

2. The parent company of respondent Dominion Energy Kewaunee, Inc. is Dominion Resources, Inc. Dominion Energy Kewaunee, Inc. has no publicly-traded nonwholly owned subsidiaries.

3. The parent company of respondent Dominion Nuclear Connecticut, Inc. is Dominion Resources, Inc. Dominion Nuclear Connecticut, Inc. has no publicly-traded nonwholly owned subsidiaries.

4. The parent company of respondent Duke Energy Carolinas, LLC is Duke Energy Corporation. Duke Energy Carolinas, LLC has no publicly-traded nonwholly owned subsidiaries.

5. The parent company of respondent Entergy Services, Inc. is Entergy Corporation. Entergy Services, Inc. has no publicly-traded nonwholly owned subsidiaries.

6. Respondent Exelon Corporation has no parent and one subsidiary with publicly traded preferred stock: PECO Energy Company.

7. The parent company of respondent Florida Power & Light Company is FPL Group, Inc. Florida Power & Light Company has no publicly-traded nonwholly owned subsidiaries.

8. Respondent Nebraska Public Power District has no parent or publicly-traded nonwholly owned subsidiaries. It is a political subdivision of the State of Nebraska.

9. The indirect or ultimate parent company of respondent PPL Susquehanna, LLC is PPL Corporation. PPL Corporation has one nonwholly owned subsidiary that is publicly traded: PPL Electric Utilities Corporation.

10. The parent company of respondent Progress Energy Carolinas, Inc., formerly known as Carolina Power & Light Company, is Progress Energy, Inc. Progress Energy Carolinas, Inc. has no publicly-traded nonwholly owned subsidiaries.

11. The parent company of respondent Progress Energy Florida, Inc., formerly known as Florida Power Corporation, is Progress Energy, Inc. Progress Energy Florida, Inc. has no publicly-traded nonwholly owned subsidiaries.

12. The parent company of respondent Southern California Edison Company is Edison International. Southern California Edison Company has no publicly-traded nonwholly owned subsidiaries.

13. The parent company of respondent Southern Nuclear Operating Company, Inc. is The Southern Company. Southern Nuclear Operating Company, Inc. has no publicly-traded nonwholly owned subsidiaries.

14. The parent company of respondent Union Electric Company, d/b/a AmerenUE, is Ameren Corporation. Ameren Corporation has three subsidiaries that have publicly traded preferred stock: Central Illinois Public Service Company d/b/a AmerenCIPS, Central Illinois Light Company d/b/a AmerenCILCO, and Illinois Power Company d/b/a AmerenIP.

15. The parent company of respondent Virginia Electric & Power Company is Dominion Resources, Inc. Virginia Electric & Power Company has no publicly-traded nonwholly owned subsidiaries.

16. The parent companies of respondent Wolf Creek Nuclear Operating Corporation are Westar Energy, Inc. and Great Plains Energy Incorporated. Wolf Creek Nuclear Operating Corporation has no publicly-traded nonwholly owned subsidiaries.

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Respondent the Ad Hoc Utilities Group ("AHUG") is comprised of sixteen American utilities that represent the majority of commercial nuclear power generation in the United States.[1] AHUG respectfully submits this brief in opposition to the briefs submitted by the United States ("Government") and USEC Inc. and the United States Enrichment Corporation (collectively, "USEC").[2]

## STATEMENT OF THE CASE

This case involves an administrative proceeding under the provisions of the Tariff Act of 1930, as amended, codified at 19 U.S.C. § 1673.[3] Those provisions authorize the Government to impose offsetting customs duties ("antidumping duties") when the Department of Commerce ("Commerce") finds, among other conditions,

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[1] The members of the Ad Hoc Utilities Group are Arizona Public Service Company; Dominion Energy Kewaunee, Inc.; Dominion Nuclear Connecticut, Inc.; Duke Energy Carolinas, LLC; Entergy Services, Inc.; Exelon Corporation; Florida Power & Light Company; Nebraska Public Power District; PPL Susquehanna, LLC; Progress Energy Carolinas, Inc.; Progress Energy Florida, Inc.; Southern California Edison Company; Southern Nuclear Operating Company; Union Electric Company (d/b/a AmerenUE); Virginia Electric & Power Company; and Wolf Creek Nuclear Operating Corporation.

[2] The Government's and USEC's briefs are cited herein as "Gov't Brief" and "USEC Brief," respectively. The Confidential and Public Joint Appendices are cited respectively as "C.J.A." and "J.A." USEC's and the Government's appendices included with their petitions for a writ of certiorari are cited as "USEC App." and "Gov't App.," respectively.

[3] All statutory references contained herein are to Title 19 of the United States Code (2000), unless otherwise noted.

that imports of foreign merchandise are being sold at a lower price in the United States than they are sold in the home country market of the foreign producer or exporter.

The antidumping proceedings at issue were initiated by Commerce in 2000 as a result of a petition brought by USEC, a privatized entity that inherited the U.S. Government's monopoly on the supply of U.S. and Russian enrichment services, against USEC's two main competitors.[4] In its petition USEC claimed that Eurodif S.A. ("Eurodif") and Urenco GmbH ("Urenco") were importing low enriched uranium ("LEU") from France, Germany, the Netherlands and the United Kingdom and selling that LEU in the United States for less than fair value. In the antidumping proceedings Commerce treated purchases by American electric utility companies of a foreign manufacturing service – the enrichment of the utilities' uranium for ultimate use in their commercial nuclear reactors – as though such service transactions were purchases of LEU. On appeal, the Court of Appeals for the Federal Circuit ("Federal Circuit") concluded that the antidumping statute unambiguously does not apply to sales of services, and that the contracts at issue were clearly for the sale of enrichment services, not LEU.

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[4] While USEC is a U.S. company, much of the enrichment services it provides to U.S. utilities are actually supplied by Russia. *See USEC Prospectus* (1998), J.A. 77, 83.

## A. The Antidumping Law

The antidumping statute authorizes Commerce to impose antidumping duties if it "determines that a class or kind of [imported] *merchandise is being*, or is likely to be, *sold* in the United States at less than fair value," and if the U.S. International Trade Commission also separately determines that such sales cause material injury or a threat of material injury to the U.S. industry producing a similar product domestically. 19 U.S.C. § 1673 (emphasis added). In general, merchandise is deemed sold at less than fair value if the price at which that merchandise is sold in the United States is less than the price at which it is sold in the exporter's home country. *See* 19 U.S.C. § 1677(35)(A) (defining the dumping margin as the amount by which the home market price ("normal value") exceeds the U.S. price ("export price" or "constructed export price")).[5]

The purpose of the dumping law is to determine, based on an examination of actual sales, whether the price for imported goods sold in the United States is unfairly low, and if so to impose antidumping duties on

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[5] "Export price" is "the price at which the subject merchandise is first sold . . . before the date of importation by the producer or exporter . . . outside of the United States to an unaffiliated purchaser . . . ." 19 U.S.C. § 1677a(a). "Export price" is generally used when the seller is outside the United States. "Constructed export price" is "the price at which the subject merchandise is first sold . . . in the United States . . . by or for the account of the producer or exporter . . . to a purchaser not affiliated with the producer or exporter . . . ." 19 U.S.C. § 1677a(b). "Constructed export price" is generally used when the seller is in the United States.

imports of those goods to offset the lower price. In determining whether imported goods are being sold in the United States at less than "fair value," the concept of sales price is central. A determination of dumping cannot be made unless there is both a "price setter" – *i.e.*, a party potentially responsible for dumping – and a sale of subject merchandise in the United States for less than the foreign market price for those goods. *See* 19 U.S.C. § 1673; Response To Court Remand, *Taiwan Semiconductor Mfg. Co. v. United States*, Slip Op. 00-48, Consolidated Court No. 98-05-02184 (June 30, 2000) ("*TSMC Remand Redetermination*") at 4 (text between nn.5-6), *available at* http://ia.ita.doc.gov/remands/00-48.htm. The law provides detailed rules on how prices for subject merchandise are to be analyzed and compared on an "apples-to-apples" basis, including how adjustments are made to account for differences in such factors as transportation costs and quantity discounts, and whether sales are made at the wholesale or retail level. *See* 19 U.S.C. §§ 1677a-1677b. Accordingly, the law requires a specific examination of each sale of merchandise, and the price of that sale, to support a determination that the sales are being made at less than fair value.

Manufacturing services transactions are not unusual in antidumping proceedings, and in 1997 Commerce issued a regulation formalizing its practice in applying the antidumping statute to those arrangements. This "tolling regulation" distinguished between sales of merchandise, which are relevant in an antidumping analysis, and sales of toll manufacturing services associated with such merchandise, which are not. The tolling regulation provided in pertinent part

that "[Commerce] will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product." 19 C.F.R. § 351.401(h) (2007).[6] Prior to this case, Commerce consistently relied on the tolling regulation to conclude that contracts for toll manufacturing services were not sales of the resulting merchandise. *See, e.g., Dynamic Random Access Memory Semiconductors of One Megabit and Above ("DRAMs") From Taiwan*, 64 Fed. Reg. 56,308, 56,318 (Dep't of Commerce Oct. 19, 1999) (treating toll manufacturing as the sale of a service, not as sales of merchandise). On that basis, Commerce has consistently determined that toll services transactions cannot be used to assess whether subject merchandise is being sold at less than fair value. *See, e.g., TSMC Remand Redetermination* at 4 (text between nn.8-9) (*"[W]e do not consider the 'sale' between the [toll services] subcontractor and such a contractor to be a sale of subject merchandise at all."*) (emphasis in original).[7]

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[6] The tolling regulation defines which parties are the "producers" of subject merchandise so Commerce can identify them as the price setters and use their transactions as the basis for its dumping determination. *See* 19 U.S.C. § 1677a (basing export price on sales by exporters or producers); 19 U.S.C. § 1677b (basing normal value on values from exporters or producers).

[7] *See also Taiwan Semiconductor Mfg. Co. v. United States*, 143 F. Supp. 2d 958, 966 (Ct. Int'l Trade 2001) ("Commerce's use of 'relevant sale' . . . furthers congressional intent for Commerce to determine whether subject merchandise is being, or is likely to be, sold in the United States at less than its fair value.").

In March 2008, over seven years after the initiation of the underlying antidumping proceeding, Commerce published a Federal Register notice withdrawing the tolling regulation, citing this case as the justification. Commerce nonetheless stated it will continue to apply the principles of the cancelled regulation on a "case-by-case" basis. *Withdrawal of Regulations Governing the Treatment of Subcontractors ("Tolling Operations")*, 73 Fed. Reg. 16,517 (Dep't of Commerce Mar. 28, 2008).

## B. Uranium Enrichment

Enrichment of uranium is one of four intermediate manufacturing processes in the production of fuel rod assemblies. Such assemblies are used in nuclear reactors to heat water and produce steam, which in turn passes through turbines to generate electricity.

Typically, utilities arrange for the production of nuclear fuel rod assemblies by purchasing uranium and then separately contracting for conversion, enrichment and fabrication services to be performed on that uranium. The utility generally begins the production process by purchasing a quantity of milled uranium ore from a mining company. It then contracts with a conversion service provider to chemically transform the milled uranium into gaseous uranium hexafluoride ($UF_6$), commonly referred to as uranium "feedstock." Next, the utility separately contracts with an enrichment service provider to enrich the $UF_6$ in the fissionable isotope $U^{235}$ to a level specified by the utility. As a final step, the utility contracts with a fabrication service provider to chemically transform the enriched $UF_6$ into an oxide, press the oxide into pellets, encapsulate the

pellets in tubes, and bundle the tubes into fuel assemblies for insertion in the utility's nuclear reactors. *USEC Prospectus* (1998), J.A. 81. The utility retains ownership of the uranium in all of its chemical forms throughout these stages of nuclear fuel production ("fuel cycle"). *Cf.* USEC Letter to Commerce (Dec. 8, 1997), J.A. 137 ("[E]nriched uranium *per se* is generally not sold within the United States. Instead, utilities typically obtain nuclear fuel by purchasing natural uranium and conversion, enrichment and fabrication services separately.").[8]

All mined uranium originally contains 0.711 percent of fissionable isotope $U^{235}$. Enrichment is the process by which a quantity of uranium is separated into two

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[8] As an alternative to enrichment services contracts, utilities occasionally purchase LEU as a whole through a contract for "enriched uranium product" ("EUP"). Under an EUP contract, ownership of the LEU is transferred from the enricher to the utility, and the utility pays the seller a price that reflects all elements of the LEU's value, including the milled uranium, the conversion services, and the enrichment services. *See USEC Inc. v. United States*, 259 F. Supp. 2d 1310, 1314-15 (Ct. Int'l Trade 2003) ("*USEC I*"), Gov't App. 178a, 182a-84a; C.J.A. 333-36. The enricher provides the uranium for enrichment in an EUP contract, pays property taxes on the uranium during enrichment, and bears the risk of price fluctuations in that uranium's value. C.J.A. 332. EUP contracts are relatively rare, and are generally for small amounts needed to supplement a utility's enrichment supply. *Cf.* C.J.A. 388; *USEC Annual Report* (2009), J.A. 53 ("Although customers may buy enriched uranium product without supplying uranium, most of USEC's contracts are for enriching uranium provided by customers."). The application of the antidumping law to EUP transactions is not at issue in this proceeding.

"streams," one with a higher concentration of $U^{235}$ (the product stream) and one with a lower concentration of $U^{235}$ (the waste stream or "tails"). This process involves a trade-off between the amount of uranium feedstock provided and the amount of energy expended (the energy is referred to as Separative Work Units, or "SWUs"). Enrichment can produce LEU with a specific $U^{235}$ concentration (or "assay") by using either less uranium feedstock and more SWU (to separate more $U^{235}$ from the waste stream), or more uranium feedstock and less SWU.[9] *See USEC Prospectus* (1998), J.A. 80 ("SWU . . . and natural uranium are, to a certain extent, interchangeable in the process to create enriched uranium.").[10] When purchasing enrichment services,

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[9] Enrichment is comparable to squeezing juice from oranges, in that the same amount of juice can be made using either more oranges and less squeezing, or fewer oranges and more squeezing. The same amount of LEU can be produced using very different amounts of SWU, depending on the amount of uranium feedstock provided by the enrichment service customer.

[10] During the antidumping proceeding at issue, enrichment was approximately 60 percent of the value of LEU. *Low Enriched Uranium from France*, 66 Fed. Reg. 65,877 (Dep't of Commerce Dec. 21, 2001) ("*Final Determination*"),Gov't App. 238a. The price of milled uranium ore increased from under $8 per pound in 2000 to a high of $136 in June 2007 before declining to $64.50 (800 percent of its 2000 price) in September 2008. As a result of this eightfold increase in price, uranium feedstock now represents a much greater portion of the LEU's value. *See* Ux Consulting, *Ux Current and Historical Price Indicators*, http://www.uxc.com/review/uxc_g_price.html. Prior extreme price fluctuations in uranium resulted in Westinghouse breaching numerous contracts with U.S. utilities for nuclear

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utilities achieve their desired balance by specifying the level of enrichment for the product derived from the feedstock and the level of depletion for the waste. Utilities adjust the amount of uranium feedstock to provide and the amount of SWUs to purchase on an order-by-order basis in order to manage their uranium inventories and fuel cycle costs. *See, e.g.*, C.J.A. 10-12.[11]

Under enrichment services contracts, the utility retains ownership of the uranium feedstock it provides to the enricher. *See USEC Annual Report* (2000), J.A. 58 ("Generally, title to uranium provided by customers for enrichment purposes does not pass to USEC.").[12] Because the enricher does not own the uranium, it does not report the uranium as an asset on its books, does not know its value, and has no legal duty

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(Cont'd)

fuel. *See Fla. Power & Light Co. v. Westinghouse*, 579 F. 2d 856, 857-58 (4th Cir. 1978); Taylor & Yokell, *Yellowcake: The International Cartel* 119-25 (1979). This situation reinforced the utilities' desire to contract separately for the uranium and the services applied to that uranium.

[11] The value of the uranium feedstock can vary considerably, because utilities purchase uranium under long-term contracts from a variety of sources in different countries at different prices. *See USEC I*, 259 F. Supp. 2d at 1314-15, Gov't App. 182a-84a.

[12] Enrichers in this regard are analogous to banks: they cannot assert ownership over the items (uranium or cash) deposited with them by their customers, even though those items may be fungible and the customers might not receive the exact same items (atoms of uranium or dollar bills) that they originally deposited.

to pay property, sales, or income taxes on it. *See id.*, J.A. 58 (indicating that USEC does not treat uranium for which it does not hold title as an asset on its balance sheet); AHUG Letter to Commerce (Apr. 5, 2001), J.A. 179 (explaining that utilities do not inform enrichers about the value of feedstock they provide for enrichment); USEC Property Tax Letter (Nov. 19, 1998), J.A. 128 ("USEC will report all the property that it owns at the two [enrichment plants] and will pay property tax accordingly. USEC does not intend to report any $UF_6$ to which it does not hold legal title.").

The industry practice of purchasing enrichment services separately from uranium was originally established by the U.S. Government. When utilities sought regulatory approval for their first nuclear reactors in the 1960s, they committed to long-term enrichment services contracts with the Atomic Energy Commission, predecessor to the Department of Energy,[13] which at the time was the monopoly provider of enrichment services. *See* Taylor & Yokell at 33; Commerce Hearing Transcript (Oct. 31, 2001), J.A. 278. Until the 1980s, utilities had no real option but to obtain 100 percent of their enrichment services needs from DOE. In 1984, DOE changed its practice and offered a new model contract allowing utilities to purchase up to 30 percent of their uranium enrichment services from other suppliers. AHUG Common Issues Brief, J.A. 273-74. Through this change, DOE specifically permitted utilities to diversify the risks of supply disruption by contracting with other enrichment suppliers.

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[13] Both the Atomic Energy Commission and the Department of Energy are referred to herein as "DOE."

Because uranium atoms are commingled in every phase of the nuclear fuel production process, ownership cannot be tracked physically. Instead, just as the financial system uses accounts to track ownership of money, uranium industry participants and government regulators rely on accounts to track both the ownership and national origin of uranium at each step in the nuclear fuel cycle. *Cf.* USEC Property Tax Letter, J.A. 129-30 (relying on feed balances to determine what uranium in its inventory is owned by each utility); USEC Letter to Commerce (Dec. 8, 1997), J.A. 138-40 (describing the importance of industry account-based systems for tracking uranium and its origin). The uranium atoms transferred after conversion, enrichment and fabrication may be different from the atoms initially provided by the utility for processing, but the contracts-based accounting system allows uranium ownership and origin to be tracked throughout the nuclear fuel cycle.[14]

Without this contracts-based accounting system for tracking ownership and origin of uranium being transferred between accounts, converters, enrichers and fabricators could not commingle uranium during the nuclear fuel cycle. *Cf.* USEC Letter to Commerce (Dec. 8, 1997), J.A. 139-40. They would have to physically segregate the uranium owned by each different utility, processing it in batches rather than as a continuous stream. Such a batch-oriented approach would be cost prohibitive, if not physically impossible, because enrichers, for example, would have to shut down the enrichment cascade and restart it for each batch of uranium provided by a utility.

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[14] Under this account-based tracking system, transfers of uranium during the nuclear fuel production cycle are often made through "book transfer" between accounts at different service providers. *See, e.g.*, C.J.A. 13, 15.

The contract-based accounting system is also crucial to the ability of industry members to comply with the multitude of regulatory requirements that are based on tracking the origin and processing of their uranium.[15] For these reasons, the ownership rights and obligations reflected in industry contracts are an essential element of both the industry and its regulation by government and international bodies.

### C. The Proceedings Below

Having initiated the underlying proceeding in 2000, Commerce published its *Final Determination* in the antidumping proceeding involving France on December 21, 2001. Gov't App. 220a-62a. Commerce's determination that Eurodif had made sales at less than fair value was based primarily on sales of enrichment services.

Commerce stated that "[w]hile we recognize that the provision of uranium feedstock may not be a payment-in-kind in the formal sense under these contracts, we maintain that the arrangement between buyer and seller in a SWU contract nonetheless is dedicated to the delivery of LEU, and critical to the trade in LEU." *Final*

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[15] *See, e.g.*, 42 U.S.C. § 2156(2) (2000), which prohibits the use of nuclear materials exported from the United States in any nuclear explosive device. Once U.S. uranium is commingled with uranium from other sources, the only way to enforce this restriction is through the tracking of origin in uranium accounts. In fact, for each delivery of LEU, the enricher separately accounts for the origin and amount of uranium feed and enrichment services associated with that feed. *See also* 10 C.F.R. § 110.32(c) (2008) (requiring tracking of country of origin for imported or exported nuclear material and processing through Nuclear Regulatory Commission license).

*Determination*, 66 Fed. Reg. at 65,884-65,885, Gov't App. 254a-55a. It was uncontested that the utilities did not sell the LEU produced from their feedstock, but rather consumed it in their own reactors. Nonetheless, Commerce concluded that "[i]t does not matter whether [Eurodif] sold subject merchandise as subject merchandise, or whether [Eurodif] sold some input or manufacturing process that produced subject merchandise, as long as the result of [Eurodif's] activities is subject merchandise entering the commerce of the United States." *Id.* at 65,879, Gov't App. 232a.

The Court of International Trade ("CIT") disagreed. It examined the enrichment contracts and concluded they were unquestionably sales of services. The CIT could not reconcile Commerce's application of the antidumping law to enrichment services transactions with prior cases in which Commerce itself had determined that transactions in toll services were not sales of subject merchandise. Specifically, the CIT noted that Commerce had previously recognized that "where the price paid for subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping duty law." *USEC I*, 259 F. Supp. 2d at 1325, Gov't App. 205-06a. The CIT remanded the case to Commerce for reconsideration. *Id.* at 1331, Gov't App. 219a.

On remand, Commerce reaffirmed its prior conclusions, asserting that "the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value." *Low Enriched*

*Uranium from France Remand Redetermination* (Dep't of Commerce June 23, 2003) ("*Remand Redetermination*"), Gov't App. 126a. On appeal, the CIT again rejected Commerce's approach, stating:

> Commerce's duty is to investigate "sales" at less than fair value. The agency's assertion that the enrichers' transactions with the utilities are the only transactions that could be such sales, without more, does not establish that there is an evidentiary or legal basis to conclude that those transactions constitute sales for purposes of our antidumping statutes.

*USEC Inc. v. United States*, 281 F. Supp. 2d 1334, 1340 (Ct. Int'l Trade 2003) ("*USEC II*"), Gov't App. 45a-46a. The parties thereafter obtained an order from the CIT permitting an interlocutory appeal, pursuant to 28 U.S.C. § 1292(d)(1) (2000), on the issues relating to Commerce's treatment of contracts for toll manufacturing services as contracts for the sale of merchandise.

The Federal Circuit affirmed the CIT's conclusion that enrichment services transactions are not sales of goods. *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005), Gov't App. 8a-28a. It agreed that the enrichment contracts "do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU." *Id.* at 1362, Gov't App. 20a. The court held that enrichment transactions were not "sales" of merchandise under the antidumping law, because "the 'transfer of

ownership' required for a sale under [*NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997)] is not present here." *Id.* The court also observed that in a recent case arising under the Contracts Disputes Act, *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002), it had agreed with the Government's own argument that similar uranium enrichment contracts were sales of services. The court found that reasoning in *Florida Power* persuasive, although it noted that "*Florida Power* is not binding precedent for this case." *Eurodif I*, 411 F.3d at 1363, Gov't App. 21a.[16]

The Government and USEC sought rehearing and rehearing *en banc*, noting in supplemental filings this Court's recently issued decision in *National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967 (2005). In *Brand X*, this Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the

[16] In the litigation underlying *Eurodif I*, the Government itself had cited *Florida Power* to the Federal Circuit as legal support for its position, noting that in that case the court had stated that its decision on the nature of the enrichment contracts was "difficult." Gov't Pet. at 15. In fact, the contracts in *Florida Power*, unlike the contracts at issue here, provided for the transfer of title over the uranium feedstock from the utility to the Government during the enrichment process. *Fla. Power*, 307 F.3d at 1373. Nevertheless, the court in *Florida Power* found no sale of a good had occurred because there was no sales price for the LEU, only for the enrichment services. *Id.* In the enrichment services contracts at issue in this case, no such title transfer for the uranium feedstock occurs, making their nature as services transactions even clearer than in *Florida Power*.

unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982.

The Federal Circuit denied rehearing *en banc*, and granted rehearing for the limited purpose of addressing the application of *Brand X*. In its rehearing decision, the court emphasized that it had not relied on *Florida Power* as binding precedent, and explained "the antidumping duty statute unambiguously applies to the sale of goods and not services." *Eurodif S.A. v. United States*, 423 F.3d 1275, 1277-78 (Fed. Cir. 2005) ("*Eurodif II*"), Gov't App. 33a. The court further affirmed its conclusion that "Commerce's characterization of the SWU contracts at issue in this case would contradict . . . the statute's unambiguous meaning because it is clear that those contracts are contracts for services and not goods." *Id.*[17]

On remand, Commerce removed the enrichment transactions from its calculations, but initially resisted excluding LEU imported pursuant to enrichment services transactions from the antidumping order. *Final Results of Low Enriched Uranium from France Remand Redetermination* (Dep't of Commerce Mar. 3, 2006), USEC App. 320a, 322a-26a. On appeal, the CIT held that because LEU imported pursuant to enrichment services contracts is never sold as merchandise, Commerce was required to exclude such

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[17] USEC claims that the court based its decision on the title retention provisions in enrichment services contracts. USEC Brief at 48-49. In fact, the decisions in *Eurodif I* and *II* were based on the contracts as a whole, including their provisions on title and payment. *See Eurodif I*, 411 F.3d at 1362-64, Gov't App. 17a-24a.

imports from the scope of the antidumping order. *Eurodif S.A. v. United States*, 431 F. Supp. 2d 1351, 1354-57 (Ct. Int'l Trade 2006), USEC App. 327a, 333a-38a. In the subsequent remand determination, Commerce modified the scope of the antidumping order accordingly, and issued a form by which Eurodif and the utilities could certify that specific LEU imports met the conditions for exclusion. *Final Results of Low Enriched Uranium from France Remand Redetermination* (June 19, 2006), USEC App. 341a.

After the CIT affirmed the remand results, the Government and USEC appealed the limited question of whether Commerce should be required to exclude imports under enrichment contracts at the time of import or only after Commerce conducted further factual analysis. The appellate court dismissed the appeal as unripe. *Eurodif S.A. v. United States*, 506 F.3d 1051 (Fed. Cir. 2007), Gov't App. 1a-7a. The Petitioners then sought review of the 2005 *Eurodif* decisions by this Court.[18]

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[18] At USEC's request, Commerce initiated a countervailing duty ("CVD") investigation involving Eurodif simultaneously with the antidumping investigation. (CVD investigations are directed at offsetting foreign government subsidies for imported goods). Under 19 U.S.C. § 1677(5)(D)(iv), the purchase of "goods" by a government for more than adequate remuneration is treated as a countervailable subsidy. Commerce found that the French government's purchase of enrichment services from Eurodif was a subsidy, but the Federal Circuit rejected Commerce's determination on the basis that the purchases were of services, not goods, and that Section 1677(5)(D)(iv) expressly only applied to purchases of goods. Neither the Government nor USEC sought further review of that determination.

## SUMMARY OF ARGUMENT

The antidumping statute, 19 U.S.C. § 1673, requires that "merchandise . . . [be] sold" at less than fair value before Commerce may find that dumping of that merchandise has occurred. *Id.* The Federal Circuit correctly applied *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in holding that the term "merchandise . . . sold" is unambiguous and does not cover sales of uranium enrichment services. Commerce's decision to apply the antidumping law to transactions in manufacturing services was inconsistent with the plain language of the statute.

Petitioners argue that the meaning of "merchandise . . . sold" is ambiguous, and that Commerce is therefore entitled to deference in interpreting that term. Even before this case, however, the Federal Circuit was presented with this same question, and it concluded that Congress intended to give the word "sold" its ordinary meaning. *See NSK*, 115 F.3d at 974. Under this Court's 2005 decision in *Brand X*, *stare decisis* bound Commerce to the *NSK* interpretation because that precedent found the relevant statutory language to be unambiguous. The Federal Circuit followed *NSK* in this case by determining that the contracts were not for sales of goods and therefore the transactions could not involve dumping.

The Federal Circuit's holdings in *NSK* and in this case are strongly supported by the statute itself and Commerce's prior practice in other cases involving manufacturing services. As this Court has held, words

in statutes must be given their accumulated, settled meaning absent evidence for a specific meaning in the statute. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). Dictionaries universally define "sale" as requiring a transfer of ownership for consideration. Thus, there can be no dumping unless ownership over the imported goods is transferred in return for a price.

Significantly, Congress has enacted other laws that allow for added duties or quota restrictions to be placed on imports without requiring sales of merchandise. *See, e.g.*, 19 U.S.C. §§ 2251 *et seq.* (allowing U.S. manufacturers to request temporary "safeguard" measures if they are being injured by foreign imports, without the need to show that imports are being sold at less than fair value or subsidized). Such laws demonstrate that Congress is fully capable of creating broad trade remedies when it so wishes.

Consistent with the unambiguous language of the statute, Commerce's past practice in cases involving all other industries has been not to treat manufacturing services transactions as "relevant sales" under the antidumping law, concluding that the antidumping statute requires a sale of merchandise at a price reflecting all elements of the merchandise's value. *See TSMC Remand Redetermination* at 4-6 (text between nn.4-12). Indeed, Commerce issued the "tolling regulation" to codify its practice with respect to such manufacturing services. Both the tolling regulation and Commerce's decisions issued on the basis of that regulation directly conflict with the specific arguments

raised by the Government and USEC in this case, including the arguments that substantial transformation and fungibility are pertinent in deciding whether a transaction is a relevant sale. Rather, Commerce has always previously concluded that where the customer continues to own an essential element of the finished product throughout the production process, no relevant sale of merchandise has occurred. *Id.* at 3-5 (text between nn.4-12).

Under enrichment services contracts, there is no payment – and thus no price – for the LEU itself, only for the enrichment services deemed to have been used in producing it. *See, e.g.*, C.J.A. 26-27. The enricher does not recognize the uranium as an asset on its books, or pay property or sales taxes on it. *See, e.g.*, USEC Property Tax Letter, J.A. 128. The enricher does not have any exposure to value fluctuations in its customers' uranium, and generally does not even know the actual value of that uranium. The delivery of uranium by the utilities to the enricher cannot be treated as a "payment in kind," as the Government suggests, when neither the utilities nor the enrichers treat it as an exchange of ownership.

Petitioners' argument that enrichment services transactions are "functionally equivalent" to sales of EUP is contradicted by the many significant differences between the two types of contracts. Indeed, every public statement by enrichers – including USEC prior to this case – accurately characterized enrichment transactions as sales of services.

USEC and the Government also argue that enrichment services contracts could be treated as sales of LEU because uranium is fungible and therefore utilities do not receive back the same uranium atoms they provided to the enricher. Under the contracts that define the transaction, however, the utility is legally deemed to receive back the same uranium it provided. C.J.A. 17, 87, 140, 188, 268. Moreover, Commerce's proposal to base its characterization of the transaction on physical tracing of uranium atoms ignores the entire accounting-based system on which the fuel cycle industry, and government regulation of that industry, are grounded.

Complaints by USEC and the Government that the *Eurodif* decisions create a "loophole" for other industries has no merit, because imported merchandise is always subject to the antidumping law if it is sold in the United States, including in circumstances where it has been incorporated into another product before that sale. U.S. companies in the steel products and semiconductor industries have long contracted for toll production services in foreign countries, and the resulting products have been routinely subject to the antidumping law when they are sold by the U.S. company after importation. The circumstances of this industry are unique, in that the utilities consume the end product and do not sell it.

The Government and USEC also argue that the Court's decision should be influenced by purported national security and foreign policy objectives that are wholly external to the antidumping statute, such as encouraging Russia to maintain the Highly Enriched

Uranium ("HEU") Agreement and supporting a private company, USEC, so that in the future it could produce enriched uranium for tritium production or military use if needed.[19] Their policy arguments are irrelevant to the legal issues raised at bar and are appropriately left to Congress. In any event, (i) the United States has a stockpile of HEU sufficient to cover U.S. defense and nuclear propulsion needs for the next 50 years, and (ii) the United States owns the enrichment facilities leased by USEC and can reclaim them if necessary. Finally, there is no evidence Russia intends to abandon the HEU Agreement if it were allowed to sell commercial enrichment services directly to U.S. utilities. To the contrary, Russia has commercial incentives to gain access to the uranium feedstock underlying blended-down HEU. Further, there is limited available demand for enrichment services not already under contract in the United States prior to expiration of the HEU Agreement in 2013.

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[19] The "HEU Agreement" is the Agreement Between The Government Of The United States Of America And The Government Of The Russian Federation Concerning The Disposition Of Highly Enriched Uranium Extracted From Nuclear Weapons, U.S.-Russia, Feb. 18, 1993, *available at* http://www.ne.doe.gov/nuclearFuelSecurity/neNFSRelatedDocuments.html.

## ARGUMENT

### I. The Antidumping Law Unambiguously Requires A Sale Of Subject Merchandise, Which Does Not Occur In Enrichment Services Transactions

Under the test enunciated by this Court in *Chevron*, a court reviewing an administrative determination based on interpretation of an agency's governing statute must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. The antidumping statute authorizes Commerce to impose antidumping duties on "foreign merchandise [that] is being, or is likely to be, sold in the United States at less than its fair value . . . ." 19 U.S.C. § 1673(1). "Dumping" is defined as the "sale of goods at less than fair value." 19 U.S.C. § 1677(34). The Federal Circuit correctly applied *Chevron* to hold – or, more accurately, to reconfirm – that the term "merchandise . . . sold" is unambiguous and does not cover sales of manufacturing services such as uranium enrichment. Commerce's attempt to stretch the law to cover such a service transaction is facially inconsistent not only with the plain meaning of the statute under which it was rendered, but also with Commerce's own regulations and uniform past practice.

### A. Commerce Was Bound By The Federal Circuit's Prior Determination That The Antidumping Law Unambiguously Requires That Merchandise Be Sold

The Petitioners argue that the term "merchandise . . . sold" is not defined in the antidumping statute, and is therefore an ambiguous phrase that Commerce should be allowed to define as it sees fit. Gov't Brief at 23-24; USEC Brief at 27-29. On the contrary, the absence of any unique statutory definition or usage demonstrates that the relevant phrase should be given its ordinary, dictionary meaning, as Commerce and the courts have uniformly interpreted it prior to this proceeding.

Indeed, the question whether the term "merchandise . . . sold" is unambiguous was not one of first impression in the Federal Circuit. That court previously considered and settled that question in *NSK*, 115 F.3d 965. In *NSK*, Commerce had determined that transactions involving free samples could be deemed "merchandise . . . sold" within the meaning of Section 1673. The government argued to the Federal Circuit, as it does here, that not deferring to Commerce's interpretation would create a loophole in the antidumping law. *Id.* at 972. As part of a detailed analysis that included consideration of dictionary definitions, the Federal Circuit held that "Congress intended to give the term ["sold"] its ordinary meaning . . . ." *Id.* at 974. It also stated that "contrary to the Government's suggestion, we do not believe that the term 'sale' should be given any special meaning under the antidumping laws." *Id.* The Federal Circuit concluded:

> [t]he terms of the statutory provisions are clear on their faces and we see no reason to

> depart from the ordinary meaning of the term 'sold' or 'sale'. We thus need not reach the second prong of the *Chevron* analysis.

*Id.* at 975. *NSK* rejected Commerce's theory that the actual terms of the transaction can be ignored in determining whether the transaction meets the statutory requirement for a sale. If there is no transfer of legal ownership for consideration, there is no sale.

In the instant case, the Federal Circuit expressly relied on *NSK*:

> [T]he SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU. As a result, the "transfer of ownership" required for a sale under *NSK* is not present here.

*Eurodif I*, 411 F. 3d at 1362, Gov't App. 20a. Under the Court's 2005 decision in *Brand X*, *stare decisis* bound Commerce to the *NSK* interpretation because that precedent found the relevant statutory language to be unambiguous. *Brand X*, 545 U.S. at 982. Specifically, consistent with the standard established by the Court in *Brand X*, *NSK* confirmed that the antidumping statute does not "admit of two or more reasonable ordinary usages," *Brand X*, 545 U.S. at 989, and thus there was no gap for Commerce to fill under *Chevron*.

### B. The Plain Meaning Of "Foreign Merchandise . . . Sold" Requires That Ownership Of The Merchandise Be Transferred In Return For Consideration

The holdings of the Federal Circuit in *NSK* and in the case at bar are supported by the available evidence regarding the meaning of the term "merchandise . . . sold," including the accumulated, settled meaning of the word "sale." *See NLRB*, 453 U.S. at 329 (stating words in statutes must be given their accumulated, settled meaning absent evidence for a specific meaning in the statute). That accumulated, settled meaning is provided by dictionaries, which universally define "sale" as requiring a transfer of ownership for consideration. *See, e.g., Black's Law Dictionary* 1337 (6th ed. 1990) (defining "sale" as a "contract . . . by which the [seller], in consideration of the payment or promise of payment of a certain price in money, transfers to the [buyer] the title and the possession of property"); *Webster's Third New International Dictionary* 2003 (1986) (defining "sale" as "a contract transferring the absolute or general ownership of property from one person . . . to another for a price"). These definitions consistently require a transfer of ownership in return for consideration. *See also NSK*, 115 F.3d at 974 n.12 (holding that because giving away a free sample is not a sale due to the lack of consideration, it cannot be dumping under the statute). There can be no dumping unless ownership over the imported goods is transferred in return for a price.

USEC and the Government ignore *NSK* and, despite the Government paying lip service to the dictionary definition of the term "sale" (Gov't Brief at 27-28), they

ignore that meaning as well. They argue, for example, that a 1984 amendment to the antidumping law adding coverage for "leasing arrangement[s] . . . that [are] equivalent to the sale of the merchandise" indicates that "foreign merchandise . . . sold" should be interpreted to encompass enrichment services contracts. USEC Brief at 33; Gov't Brief at 30. The fact that Congress specifically extended the definition of "sale" to certain lease transactions equivalent to sales provides no basis to conclude that the definition of "sale" was extended to other areas as well.[20] Indeed, if the law had been extended to cover toll manufacturing services as USEC and the Government now suggest, then Commerce's tolling regulation would have been both unnecessary and unlawful, because it required treating toll services as sales of services rather than sales of merchandise.

Petitioners similarly assert the term "merchandise . . . sold" should be given a broader meaning because courts have occasionally held that specific leases and options contracts qualify as "sales" under other unrelated statutes. *See* USEC Brief at 30-31; Gov't Brief at 29. The cited cases are not relevant to defining "merchandise . . . sold" in the antidumping law for two reasons.

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[20] Congress amended the law to cover leases that qualify as transfers of ownership. Congress noted the lease provision was intended to capture "sham leases or leases which are tantamount to sales. Because of tax considerations or other business reasons, leasing arrangements are often utilized to accomplish what are in effect transfers of ownership." H.R. Rep. 98-725, at 11 (1st Sess. 1984), *as reprinted in* 1984 U.S.C.C.A.N. 5138. Thus, even in lease transactions there must be a transfer of ownership before Commerce may impose antidumping duties.

First, the cited cases were intended to prevent parties from avoiding a statutory scheme by structuring their sales transactions as leases and options contracts rather than outright sales. *See SEC v. National Securities, Inc.*, 393 U.S. 453 (1969) (finding takeover bidder used fraudulent and misleading statements to shareholders in takeover bid, contrary to Securities Act's prohibition on securities fraud); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392 (1965) (finding natural gas pipeline company converted purchases of natural gas to lease of gas production rights, thereby avoiding federal price controls on natural gas); *Gray v. Powell*, 314 U.S. 402 (1941) (finding coal purchaser leased established coalfield output rather than purchase coal to avoid federal price controls on coal). No party has argued that enrichment services transactions were designed to circumvent the antidumping law, so expansion of the plain definition of "sale" is not warranted.

Second, in each of the cited cases there was a transfer of some ownership rights in return for consideration. In *National Securities*, a corporate takeover was achieved through purchase of shares and shareholder merger approval. In *United Gas* and *Gray*, the buyers purchased leases to production from an established field at a fixed price. In enrichment services contracts, by contrast, no lease or other transfer of ownership rights takes place.

The Government also claims Commerce can treat enrichment services transactions as sales of LEU because utilities separately purchase both the uranium feed and enrichment services. Gov't Brief at 27-32.

However, the statute requires that the *subject merchandise* be sold for less than fair value, and defines "subject merchandise" as "the class or kind of merchandise that is within the scope of an investigation . . . ." 19 U.S.C. § 1677(25). That definition leaves no gap for Commerce to fill by treating separate sales of raw materials and processing services as sales of subject merchandise. If Commerce were able to treat separate sales of inputs and services as sales of subject merchandise, the whole concept of dumping would become meaningless: there would be no price setter establishing the export price for the subject merchandise, no sales price of that merchandise to compare against home market value, and thus no basis for a dumping determination.[21]

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[21] The Government argues that Sections 1677a and 1677b(e)(1) support its claim that a dumping determination can be based on a "price" fabricated from separate sales of components and processing services. Gov't Brief at 33, 42. This is facially incorrect. Section 1677a simply allows Commerce to adjust the sales price as necessary to enable an "apples-to-apples" comparison between home market value and export price, by removing shipping costs and value added after import, for example. Whether based on export price or constructed export price, the price for subject merchandise must be based on a sale of the merchandise itself, not on sales of input values for that merchandise. *See* Comm. on Ways and Means, 109th Cong., *Overview and Compilation of U.S. Trade Statutes*, Pt. I, at 106 (2005) ("*Overview of US Trade Law*"), *available at* http://waysandmeans.house.gov/Documents.asp?section=9 ("'Constructed export price' is the price at which merchandise is sold or agreed to be sold in the United States before or after importation, by or for the account of the producer or exporter to the first unrelated purchaser. Typically, it is used if the

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Crucially, when Congress intended to provide import remedies not requiring a sale of the imported merchandise, it said so explicitly. *See, e.g.*, 19 U.S.C. §§ 2251 *et seq.* (allowing U.S. manufacturers to request temporary "safeguard" measures such as additional duties or quota restrictions if they are being injured by foreign imports). As Congress stated in amending the antidumping law in 1979:

> [The antidumping] statute is not intended to "protect or remedy" an injury from imports as contemplated under [the "safeguards" statute], nor is it just one of several remedies from which the Administration may choose to remedy import injury to a domestic industry. Rather, it is a remedy targeted at a specific type of injury caused by unfair import competition, and the Committee expects it to be administered in that context.[22]

USEC did not seek protection under the safeguards provision of 19 U.S.C. § 2251; it petitioned Commerce under the antidumping law. USEC Petition, J.A. 39. That

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purchaser and exporter are related."). By contrast, Section 1677b allows Commerce to base *normal value* – *i.e.*, the home country market value above which goods must be sold to avoid dumping – on the cost of producing the goods when an accurate home market price is not available. 19 U.S.C. § 1677b(a)(5). Neither Section 1677a nor Section 1677b allows Commerce to invent a sale of merchandise in the United States based on component values.

[22] H.R. Rep. No. 96-317 at 46 (1st Sess. 1979). *See generally Overview and Compilation of U.S. Trade Statutes*, *supra* n.21.

law, on its face, applies only when subject merchandise as a whole is sold for less than fair value.

Petitioners have previously acknowledged that the antidumping statute unambiguously applies only to foreign merchandise actually sold or likely to be sold in the United States. *See* USEC Certiorari Petition Brief at 21 ("No one contests that the statute applies to the sale of goods and not services."); Gov't Certiorari Petition Reply Brief at 4 ("The statute applies when there is a 'sale' of 'foreign merchandise.'"). Yet their briefs on the merits, like Commerce's determination at issue in this case, make a number of arguments that ignore the requirement for a sale of subject merchandise. *See, e.g.*, Gov't Brief at 8, 33 (arguing that Commerce may impose antidumping duties whenever a "major manufacturing operation . . . results in subject merchandise being introduced into the commerce of the United States"), *quoting Remand Redetermination*, Gov't App. 231a, 239a-40a; USEC Brief at 23, 39-41 (arguing that Commerce may impose antidumping duties on enrichment services because such services result in the substantial transformation of uranium feedstock into LEU). These arguments are unavailing. The statute unambiguously requires that foreign merchandise be sold before Commerce may find it to have been dumped and impose antidumping duties.

The Government incorrectly argues that Commerce may base dumping determinations on toll manufacturing transactions because the statute refers to both sales and "likely sales" of subject merchandise. Gov't Brief at 30. The statute's reference to "likely sales" allows Commerce to calculate dumping margins based on

imminent sales of subject merchandise that contain specific price terms. *See* 19 U.S.C. § 1677a; *see also* H.R. Rep. No. 98-725 at 11, *as reprinted in* 1984 U.S.C.C.A.N 5137 (explaining that the inclusion of "likely sales" "is intended to eliminate uncertainties about the authority of the Department of Commerce . . . in situations where actual importation has not yet occurred but a sale for importation has been completed or is imminent."); S. Rep. No. 66-510 at 1 (2d Sess. 1920) (noting that the "purchase price" for imported merchandise was "the price or amount paid or to be paid for purchased merchandise as packed ready for shipment . . ."); *see also Kerr-McGee Chemical Corp. v. United States*, 765 F. Supp. 1576, 1580 (Ct. Int'l Trade 1991) ("The court does accept, as a reasonable application of the statute, [Commerce's] insistence on evidence of the seller's intention to sell at a specific price."). Those likely sales must by definition specify a price for the subject merchandise as a whole, not just the price for toll manufacturing.

### C. Commerce's Tolling Regulation And Uniform Practice Confirm That Sales Of Manufacturing Services Are Not Sales Of Subject Merchandise

Prior to this case, Commerce had a long-established practice of not treating transactions in toll manufacturing services as sales of merchandise, on the basis that the price paid for such services does not reflect the value of the merchandise as a whole. In fact, Commerce issued the tolling regulation to codify its practice on the treatment of manufacturing services. The agency only recently revoked the tolling regulation in an effort to avoid the result in this particular case.

The tolling regulation, 19 C.F.R. § 351.401(h), required that Commerce's dumping analysis be based on a "relevant sale" of subject merchandise. Commerce has clarified that the relevant sale under the tolling regulation is the "first sale in the distribution chain by the company that is in a position to set the price of the product, and by doing so, to sell at less than fair value in or to the U.S. market." *TSMC Remand Redetermination* at 4 (text between nn.4-5). As Commerce further explained:

> [T]he price paid [in a toll service transaction] may not represent the entire value of the subject merchandise, but merely represents a portion of that value. In fact, in most subcontracting arrangements, the contractor *already owns an essential portion of the product*, and thus the price paid is only for the work performed by the subcontractor; that is, the sale by the subcontractor is only a sale of the service it performed (and any inputs provided). Under these circumstances, . . . *we do not consider the 'sale' between the subcontractor and such a contractor to be a sale of subject merchandise at all.*

*Id.* at 4 (text between nn.8-9) (Emphasis in original).

Commerce's statement in the *TSMC Remand Redetermination* above leaves no doubt that sales of toll manufacturing services are not sales of subject merchandise. Commerce's recognition in the tolling regulation that sales of toll services are not sales of subject merchandise flows directly from the antidumping law's requirement that subject merchandise be sold before Commerce may determine

an export price for the merchandise or impose antidumping duties on its importation. *See* 19 U.S.C. § 1677a; *TSMC Remand Redetermination* at 3-4 (text between nn.3-4) (explaining that its tolling practice is consistent with 19 U.S.C. §§ 1677(a) and (b)).

Nevertheless, USEC and the Government claim that enrichment services contracts may be considered sales of LEU based on the very arguments rejected by Commerce in its prior tolling cases. In particular, they rely heavily on Commerce's conclusions that LEU is a major manufacturing operation which substantially transforms fungible uranium into a new and different article. They assert that although LEU is not sold in a single transaction representing the full value of the merchandise, Commerce can nonetheless combine separate transactions for uranium and enrichment services to create the sale of LEU because the transaction resulted in the delivery of LEU in the United States. Gov't Brief at 25-34; USEC Brief at 38-42. As determined by the court below, however, these factors have not been determinative of whether merchandise is sold under the statute. *See USEC II*, 281 F. Supp. 2d at 1343, Gov't App. 52a ("[W]e find Commerce's continuing attempts to distinguish its earlier tolling cases from the instant case unpersuasive.").[23]

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[23] The Government asserts that the tolling regulation is applicable only to the calculation of dumping margins, not to the applicability of the antidumping law. Gov't Brief at 7. Yet these are two sides of the same coin. The statutory requirement that dumping determinations be based on sales of the subject merchandise cannot be met unless there is a relevant sale of the subject merchandise as a whole. If a particular transaction does not include all elements of the subject merchandise's value, then

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Specifically, Commerce has never treated tolling transactions as relevant sales based on whether the tolling results in substantial transformation of inputs provided by the owner into a new and different article. *See, e.g., Collated Roofing Nails From Taiwan*, 62 Fed. Reg. 51,427, 51,435 (Dep't of Commerce Oct. 1, 1997) (toll service provider transformed wire rod owned by another into collated roofing nails); *Stainless Steel Wire Rod From Sweden*, 63 Fed. Reg. 40,449, 40,453-54 (Dep't of Commerce July 29, 1998) (toll service provider transformed steel billets owned by another into stainless steel wire rod); *Certain Forged Stainless Steel Flanges From India*, 58 Fed. Reg. 68,853, 68,855-56 (Dep't of Commerce Dec. 29, 1993) (toll service provider transformed steel into customized flanges).[24]

Likewise, Commerce has not treated toll services transactions as relevant sales based on whether they involve fungible inputs. For example, in *Polyvinyl Alcohol From Taiwan*, 63 Fed. Reg. 32,810 (Dep't of

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it cannot be a sale of that merchandise and cannot provide a basis for Commerce's dumping determination. 19 C.F.R. § 351.401(h). Where there is no dumping, Commerce may not impose antidumping duties. 19 U.S.C. § 1673. For example, the law excludes from dumping duties temporary imports that will be reexported without being sold in the United States. *See, e.g., Final Determination*, Gov't App. 223a-24a.

[24] In the *TSMC Remand Redetermination* Commerce found a toll services transaction not to be a sale of subject merchandise even though the U.S. company only provided a semiconductor design and the foreign manufacturer provided the inputs and performed all the manufacturing of the semiconductors. *TSMC Remand Redetermination* at 3-5 (text between nn.3-12).

Commerce June 16, 1998) ("*PVA*"), the foreign toll producer received fungible inputs from third parties such as DuPont and used those inputs, along with similar inputs of its own, to produce PVA, a fungible chemical product. Despite the fungible nature of both the inputs and the finished product, Commerce found the toll service transaction to be a sale of services rather than a relevant sale because the service transaction did not include all elements of the subject merchandise's value. *Id.* at 32,811, 32,817; *see also Certain Forged Stainless Steel Flanges from India*, 58 Fed. Reg. 68,853, 68,856 (Dep't of Commerce Dec. 29, 1993) (explaining that "all of the flanges are essentially fungible").

Commerce has consistently concluded that where the customer continues to own an essential element of the finished product throughout the production process, no relevant sale has occurred.[25] *See, e.g., Collated Roofing Nails from Taiwan*, 62 Fed. Reg. at 51,435 (finding no sale because respondent "pays a processing fee and maintains title over the raw materials and completed collated roofing nails throughout the production process"); *Stainless Steel Bar from India*, 65 Fed. Reg. 59,173, 59,174 (Dep't of Commerce Oct. 4, 2000) (finding no sale because respondent purchased inputs, paid a processing fee and maintained title to the inputs and final product); *Stainless Steel Wire Rod from*

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[25] Commerce made clear when adopting the tolling regulation that tolling transactions generally do not include a transfer of ownership over the goods being processed. *See Antidumping Duties; Countervailing Duties: Notice of proposed rulemaking and request for Public Comments*, 61 Fed. Reg. 7,308, 7,330 (Dep't of Commerce Feb. 27, 1996) (explaining that the party contracting for toll manufacturing services generally owns the goods being manufactured).

*Sweden*, 63 Fed. Reg. at 40,453-54 (finding no sale because respondent "retains title to the billets at all times and simply pays [the toll services provider] a processing fee"); *Certain Forged Stainless Steel Flanges from India*, 58 Fed. Reg. at 68,855-56 (finding no sale because respondent "purchases and maintains title (during the entire course of production) to the raw materials used"). In each case Commerce held that a sale for determining dumping must be a sale of the goods as a whole, not just the sale of the service for toll manufacturing those goods.

The single genuine distinction between this case and other tolling cases is not the transaction itself, but what happens after importation. In prior tolling cases involving other industries, the subject merchandise has been sold in a subsequent transaction, and Commerce based its dumping determination on that later sale.[26] *See, e.g., PVA*, 63 Fed. Reg. at 32,812. In contrast, LEU imported under enrichment services contracts is consumed by the utilities themselves and not subsequently sold. Indeed, Commerce claims in its *Remand Redetermination* that it had to treat enrichment services transactions as relevant sales of subject merchandise for the very reason that there was no subsequent sale of the LEU. *Remand Redetermination*, Gov't App. 121a-26a; Gov't Brief at 13. This is nothing more than results-driven decision-making by the agency.

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[26] Thus, in some cases U.S. companies have been designated as the "foreign producer" because they were the first parties to sell the merchandise in the United States at a price reflecting all elements of the product's value. *See, e.g., TSMC Remand Redetermination* at 6 n.4; *PVA*, 63 Fed. Reg. at 32,819.

Commerce acknowledged in the *TSMC Remand Redetermination* that its definition of "relevant sale" was required by the statute:

> The practice of determining producer status based upon who is in control of the production and relevant sale is consistent with sections 772(a) and (b) of the Tariff Act of 1930, as amended, which define "export price" and "constructed export price" as the price at which the *subject merchandise is first sold (or agreed to be sold)* by the producer or exporter of such merchandise to an unaffiliated purchaser in, or for exportation to, the United States. Because a subcontractor does not sell "subject merchandise," but rather only sells services and/or inputs, the export price (or constructed export price) cannot be derived from the subcontractor's "sales."

*TSMC Remand Redetermination* at 3 (text between nn.3-4) (emphasis in original). Therefore, Commerce's revocation of the tolling regulation is not in accordance with the statute.

If a given transaction is a relevant sale, it must be used by Commerce to determine dumping. If it is not a relevant sale, it cannot be used to determine dumping. That principle remains applicable whether or not any other transaction in the distribution chain qualifies as a relevant sale. *USEC II*, 281 F. Supp. 2d at 1340, Gov't App. 43a-46a. The antidumping statute does not authorize Commerce to invent a relevant sale when no such sale occurred just to reach a desired end result.

That Commerce did so in this case leaves its determination unsupported by substantial evidence and not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).[27]

### D. The *Eurodif* Decisions Properly Recognize That Enrichment Services Transactions Are Not Sales Of LEU Because There Is No Transfer Of Ownership In Return For Consideration

Because enrichment services contracts do not transfer ownership over the uranium being enriched and do not provide a price for the resulting LEU, every court that has reviewed those contracts, including the court below, has concluded that they are for services contracts, regardless of the legal context in which those contracts were analyzed.[28]

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[27] As the Court has stated, "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 698 (1991) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988)). Even if Commerce were due deference under the second prong of *Chevron*, however, Commerce's determination would fail because the agency's interpretation, which contradicted its long-standing and uniformly-applied position codified in its tolling regulation, did not reflect a "reasonable policy choice." *Chevron*, 467 U.S. at 843.

[28] *See, e.g., Huffman v. Western Nuclear, Inc.*, 486 U.S. 663, 664 (1988) ("In § 161(v) [of the Atomic Energy Act of 1954], Congress accounted for this *de facto* monopoly by authorizing

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The Government nonetheless argues that even if contract manufacturing transactions are not sales of merchandise under the antidumping statute, it was permissible for Commerce to construe the enrichment contracts as actual sales of merchandise. Gov't Brief at 44. This approach would allow Commerce to evade the requirements of the statute simply by mischaracterizing the contracts' terms and labeling the service contracts as sales of merchandise.

Critically, in enrichment services transactions the utility owns the uranium delivered to the enricher for enrichment. *See, e.g.*, C.J.A. 17, 140; USEC Property Tax Letter, J.A. 128. In enrichment services transactions the enricher does not receive title to the uranium. C.J.A. 17, 87, 140, 188, 267; J.A. 58 ("Generally, title to uranium provided by customers for enrichment purposes does not pass to USEC."). Obviously the enricher cannot convey title to uranium it does not own. *Eurodif I*, 411

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the Atomic Energy Commission to offer 'toll enrichment' services whereby utilities could obtain unenriched uranium on the open market and have it enriched by the AEC for a fee."); *Florida Power*, 307 F.3d 1364 (applying the Contract Disputes Act); *Centerior Serv. Co. v. United States*, No. 95-103C, 1997 U.S. Claims LEXIS 323, at *19 (Dec. 29, 1997) (applying the Uniform Commercial Code); *Barseback Kraft AB v. United States*, 36 Fed. Cl. 691, 705 (1996) (applying the Uniform Commercial Code); *see also DOE Uranium Enrichment Program*, 51 Fed. Reg. 11,811, 11,812 (Dep't of Energy Apr. 7, 1986) (describing enrichment as "an arrangement whereby uranium supplied by a customer is enriched in uranium-235 content by DOE and then returned to that customer" and stating that such "[s]ervices are provided under contracts which are generally signed with publicly or privately owned utilities").

F.3d at 1362, Gov't App. 20a ("[T]he SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU. As a result, the 'transfer of ownership' required for a sale under *NSK* is not present here."). It follows that utilities receive back their own uranium after it has been enriched.[29] USEC and the Government deride this fact as a "legal fiction." USEC Brief at 49, 54; Gov't Brief at 45-46. However, this "legal fiction" is a contractual and economic reality that defines both the transaction as a whole and the legal rights that flow from it, and is critical to regulation of the entire nuclear fuel cycle.

Under enrichment contracts, there is no payment – and thus no price – for the LEU itself, only for the enrichment services deemed to have been used in producing it. USEC and the Government attempt to characterize the provision of uranium feedstock for enrichment as a payment in kind by the utilities in return for some portion of the LEU delivered by the enricher at the end of the enrichment process. USEC Brief at 4; Gov't Brief at 48. This assertion is not supported by the facts, however. As noted above, title to the uranium feedstock is never transferred from the utility to the enricher. The enricher does not recognize the uranium as an asset on its books, or pay property or sales taxes on it. *USEC Annual Report* (2000), J.A. 58. Indeed, the enricher does not have any exposure to value fluctuations in its customers' uranium, and generally

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[29] Consistent with that concept, the utilities receive back uranium with the same origin as the uranium feed they provided. *See, e.g.*, C.J.A. 87-88, 140, 268.

does not even know the actual value of that uranium. J.A. 58; AHUG Letter to Commerce (Apr. 5, 2001), J.A. 179. The provision of uranium feedstock for enrichment cannot be a payment in kind when neither the utility nor the enricher treats it as an exchange of ownership over the uranium being enriched.[30]

Commerce's method for determining dumping in its investigation confirms that there is no sale of LEU in enrichment services transactions. As the Government concedes, in determining whether French LEU was being dumped in the United States, Commerce had no value for the uranium itself, because that value was not part of the enrichment services transactions under which the LEU was produced. Gov't Brief at 11. Accordingly, to account for information that did not exist, Commerce estimated a value for the uranium feedstock, and then included that same value in both its estimate of how much LEU was sold for in the United States and how much it was sold for in France. As Commerce acknowledged in its *Remand Redetermination*:

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[30] USEC and the Government claim that, regardless of who owns the uranium feedstock, the enricher owns the LEU until delivery, so title must transfer from them to the utility. USEC Brief at 49-50; Gov't Brief at 50. The assertion that enrichers own LEU even though they do not own the uranium from which it was created is baseless. The legal concept of ownership is defined in enrichment transactions by the contracts that effectuate the transaction. Under those contracts, the utility owns its uranium feedstock until that feedstock is deemed to have been enriched, at which point the utility's title to the feedstock *becomes* title to the LEU derived from it. C.J.A. 17, 87, 140, 188, 267-68. Transformation of the uranium from one form into another does not affect the uranium's ownership, which remains at all times with the utility.

> In assigning a specific monetary value to the natural uranium component, we *estimated* the market value using the average price the enrichers charged their customers for natural uranium for LEU contracts. For SWU contracts, when comparing U.S. Price with Normal Value based on constructed value, we valued natural uranium using exactly the same value for both sides of the equation. For example, for any given shipment pursuant to a SWU contract we determined the quantity (*i.e.* kgs) of associated feed uranium by applying the industry standard formula for product and tails assay specified in the contract. We valued this quantity using POI average per-kg price for natural uranium charged by enrichers. This exact same amount was included in normal value.

*Remand Redetermination*, Gov't App. 131a (quoting *Final Determination*, Gov't App. 257a) (emphasis added). By proceeding in this manner, Commerce included the same fictitious input value on both sides of its dumping equation, thereby eliminating the estimated uranium value from the dumping determination entirely. All that was left was the price for enrichment services, which Commerce, in effect, treated as the price for the LEU as a whole. That approach was unlawful because Commerce cannot determine whether goods are being dumped without a price for the goods themselves. 19 U.S.C. §§ 1677a(a), (b) (basing both "export price" and "constructed export price" on "the *price* at which the subject merchandise is first sold") (emphasis added).

USEC and the Government argue that enrichment services contracts must be sales of LEU because uranium is fungible, so utilities do not receive back at the end of the enrichment process the same uranium atoms provided at the beginning of the enrichment process. USEC Brief at 43-48; Gov't Brief at 45-50. The fungibility of uranium is irrelevant to the nature of the transaction, however. Under the contracts that define the transaction between the parties, the utility is legally deemed to receive back the same uranium provided at the start of enrichment. C.J.A. 17, 87, 140, 188, 268. That transaction is established by the contract between the parties, not by the enricher's commingling of uranium feedstock.

Indeed, the suggestion that Commerce can base its characterization of the transaction on physical tracing of uranium atoms makes no sense. Much of the nuclear fuel cycle – not just enrichment – is based on accounting for quantities rather than specific atoms. The contractual transfer generally takes place when quantities are transferred between accounts at the enricher to accounts at the fabricator, not when physical delivery takes place. C.J.A. 15, 85, 143, 187, 266. If carried to its logical conclusion, Petitioners' argument for atom tracing would preclude verification of whether LEU enriched by any particular enricher ultimately was delivered to the utilities, and the entire account-based system of tracking nuclear materials would collapse.

USEC and the Government point to cases on the law of bailment as a *post hoc* rationalization to support their claim that the advancement and commingling of fungible merchandise results in a sale of goods rather

than a service transaction. USEC Brief at 46-48; Gov't Brief at 48-49. The bailment cases are irrelevant, however. *NSK* and Commerce's tolling regulation have already provided a definition of "sale" in the dumping context, so there is no need to look to unrelated areas of law to define it. Regardless, the bailment opinions cited by USEC and the Government characterized transactions only when the contracts themselves were unclear on the issue. They did not override the expressed intent of the parties. *Powder Co. v. Burkhardt*, 97 U.S. 110, 119 (1877) (noting that the contract "contain[ed] no reservation of title in the goods"); *Sturm v. Boker*, 150 U.S. 312, 322 (1893) (recognizing that contract terms determine bailment); *see also* 8A Am. Jur. 2d *Bailments* § 29 (2008) (explaining that "an express agreement will prevail against general principles of law").

Finally, USEC and the Government claim that enrichment services transactions should be treated as sales of LEU because, according to them, such service transactions are "functionally equivalent" to sales of EUP. *See, e.g.*, USEC Brief at 35; Gov't Brief at 10, 25-26. But the argument that the *Eurodif* decisions elevate contract "form" over "substance" is baseless. As the lower courts properly found, there are fundamental differences in the substance of the transaction and the parties' rights and obligations between enrichment contracts and EUP sales. Of particular note:

- In enrichment contracts, the utility owns the uranium throughout the transaction. C.J.A. 17, 87, 140, 188, 267-68. In EUP sales the utility purchases a complete product from the enricher and gains title at that time. C.J.A. 333, 392.

- In enrichment contracts, the utility pays only for a quantity of enrichment services deemed provided by the enricher. C.J.A. 26-27, 97, 134, 199-200, 276-77. In EUP contracts, the utility pays a price for the LEU as a whole. C.J.A. 335-36, 393.

- In enrichment contracts, two utilities can purchase the same amount of SWU but receive vastly different quantities of LEU, depending on the amount of uranium they decide to enrich and how much $U^{235}$ they want the enricher to "squeeze" out of the waste stream from that uranium. In EUP contracts the utility purchases a specific quantity of LEU denominated in kilograms of EUP. C.J.A. 332, 388.

- In enrichment contracts, the utility is responsible for providing uranium feedstock to be enriched. C.J.A. 13, 83, 140, 182-83, 268-69. In EUP contracts, the utility has no such responsibility. C.J.A. 332, 390 (no provision for delivery of uranium feedstock).

- In enrichment contracts, the utility bears the risk of price fluctuations in the uranium feedstock. In EUP contracts the enricher bears that risk.

- In enrichment transactions, the utility is ultimately responsible for all property taxes owed on the uranium being enriched. USEC Property Tax Letter, J.A. 128; C.J.A. 26-27, 97-98, 200-01. In EUP transactions the enricher is

responsible for taxes prior to delivery. C.J.A. 336, 394.[31]

- In enrichment contracts, the utility owns the depleted tails material unless the parties agree under the contract that the enricher will dispose of the waste material. C.J.A. 25, 96, 129-30, 198, 274. In EUP contracts, the enricher owns and is responsible for disposition of all depleted tails materials without the need for allocation in the contract. *See generally* C.J.A. 325, 378 (no tails material responsibility allocation).

Most fundamentally, the contracts at issue are entitled "Uranium Enrichment Services Contracts." They describe transactions in which utilities deliver uranium feedstock they own for processing by an enrichment services provider for a fee based on the amount of service provided. *See, e.g.*, C.J.A. 10, 17, 26. Every statement by enrichers – including USEC and its predecessor DOE prior to this case – characterized these transactions as sales of services. *See, e.g.*, *USEC Annual Report* (2000), J.A. 51 ("USEC, a global energy company, is the world leader in the sale of uranium fuel enrichment services . . ."), 53 ("Substantially all of USEC's revenue is derived from the sale of uranium enrichment services, denominated in SWU."). All of the

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[31] In certain enrichment contracts the utility may request that the enricher handle the payment of foreign taxes because the U.S. utility may be unfamiliar with tax procedures in other countries. *See, e.g.*, C.J.A. 135-36, 300-01. Contractual delegation of responsibility notwithstanding, as the uranium's owner the utility is ultimately responsible for payment of all property taxes on the uranium being enriched.

evidence confirms that the transaction entered into by the parties is for the provision of services rather than the purchase of goods.[32]

Ultimately, Petitioners argue that Commerce should be allowed to invent sales of subject merchandise for purposes of the antidumping law when the parties to the transaction do not actually intend for there to be a sale. USEC Brief at 50; Gov't Brief at 52. Because the parties did not intend to exchange ownership, however,

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[32] USEC and the Government argue that enrichment is not really a service because it results in the production of a tangible good, citing to 19 U.S.C. § 2114b(5), or because it involves a "major manufacturing process." USEC Brief at 42; Gov't Brief at 25. Section 2114b(5) has no relation to the antidumping law, and includes "construction," which like enrichment results in the production of a tangible good. Moreover, the United States and other countries negotiating under the World Trade Organization's General Agreement on Trade in Services ("GATS") included uranium manufacturing services "on a fee or contract basis" as services covered by the GATS, which does not provide an antidumping remedy for sales of services. *See* Central Product Classification Division 88, J.A. 190. Finally, Commerce declares that it does not consider a "major manufacturing process" to be a "service," *Final Determination*, Gov't App. 240a, yet its own tolling regulation treated the provision of toll manufacturing services as a service. *See, e.g., TSMC Remand Redetermination* at 4 (text between nn.8-9) ("[T]he sale by the [toll manufacturer] is only a sale of the service it performed . . . ."). The service provided in *TSMC* – taking a semiconductor design and using it to produce finished semiconductors – was certainly a "major manufacturing process," yet Commerce had no difficulty treating it as a service. The distinction between sales of goods and services is not the activity being performed, but what is being sold.

the price they negotiated did not reflect the full value of the goods, and there could not have been dumping.

## II. The *Eurodif* Decisions Do Not Create A Loophole In The Antidumping Law

USEC and the Government attempt to shore up their legal arguments by claiming that the *Eurodif* decisions create a "roadmap" for foreign manufacturers and U.S. importers to evade the antidumping law. According to USEC and the Government, consumers of steel, wood, semiconductors and other imports will restructure their purchase transactions into sales of toll services to avoid the antidumping law if the Court allows the *Eurodif* decisions to stand. USEC Brief at 54; Gov't Brief at 34-37. Even if this were true, Commerce could not ignore the unambiguous language of the governing statute to avoid what it deemed to be an undesirable result. In any event, the loophole argument is a "straw man" with no legal merit, for one simple reason: imported merchandise is always subject to the antidumping law if it is sold at less than fair value within the United States. U.S. companies already contract for toll services in producing steel products and semiconductors overseas for use in the United States, yet such goods imported under toll services contracts have been routinely subject to the antidumping law when those goods are sold by the owner in a subsequent transaction. *See, e.g.*, tolling cases cited *supra* at 33-35. Only goods that are never sold, and therefore cannot be dumped, are outside the scope of the antidumping law.

The Government argues that toll enrichment contracts must be subject to the antidumping law

because Commerce may not impose antidumping duties based on post-import transactions. It concedes the agency may base a dumping determination on downstream sales when the importer and the seller are affiliated, but claims, erroneously, that Commerce may not rely on downstream sales when the parties are unaffiliated (*e.g.*, in toll service transactions). Gov't Brief at 37. Both the statute and Commerce's "case-by-case" application of the tolling regulation empower the agency to make dumping determinations and impose antidumping duties based on "the first sale in the distribution chain by the company that is in a position to set the price of the product, and by doing so, to sell at less than fair value in or to the U.S. market." *TSMC Remand Redetermination* at 4 (text between nn.4-5); 19 U.S.C. § 1677a. Whether that first sale takes place before or after importation is irrelevant.

In fact, contrary to the Government's claims, Gov't Brief at 36, Commerce can base a dumping determination on post-import sales of subject merchandise even if that merchandise has been further manufactured or incorporated into another article.[33] In those circumstances, the antidumping law allows Commerce to determine a price for the imported merchandise by deducting from the sale price any value added in the United States by that further manufacturing, regardless of any affiliation between the

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[33] For example, Commerce has stated that "where rollerchain constitutes the subject merchandise and enters the United States, but the first sale to an unaffiliated purchaser is the sale of a motorcycle that contains the roller chain, the law is applicable to such entries of rollerchain." *Final Determination*, Gov't App. 233a.

producer and the entity performing the further manufacturing. 19 U.S.C. § 1677a(d) ("[T]he price used to establish constructed export price shall also be reduced by – (2) the cost of any further manufacture or assembly ...."); *see also NSK Ltd. v. United States*, 245 F. Supp. 2d 1335, 1365 (Ct. Int'l Trade 2003) (even in unaffiliated transactions "Commerce must reduce the price used to establish [constructed export price] by ... certain expenses resulting from further manufacturing ... after importation ..."); *Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 Fed. Reg. 3,822 (Dep't of Commerce Jan. 24, 2006), Issues and Decisions Memorandum at 5, *available at* http://ia.ita.doc.gov/frn/index.html (explaining that costs of further manufacturing can be removed from constructed export price "whether the further processing is done by an affiliated party or by an unaffiliated toller").

Under section 1677a(d), for example, toll manufactured steel plate imported to make automobiles can be subject to a dumping determination based on sales of the automobiles; toll produced lumber imported and used to produce furniture would be subject to a dumping determination based on sales of the furniture; and toll produced semiconductors imported and incorporated into computers would be subject to a dumping determination based on sales of the computers. In no case would Commerce be prohibited from making a dumping determination based on actual sales of goods in the United States just because those goods were imported under a toll services arrangement and then further manufactured in the United States. *Cf.* H.R. Rep. No. 103-316 at 825-26 (2nd Sess. 1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4165 (noting that under Section 1677a(e), "the imported components will not be

exempt from antidumping duties").[34] Only if the imported merchandise is never sold in any form is Commerce prevented from determining whether dumping is occurring, because in that case there are no sales that could constitute dumping.[35]

USEC and the Government have not identified a case in which other industries imported toll produced goods that were never sold in a subsequent transaction, or where importers restructured their purchase transactions in order to take advantage of the *Eurodif* decisions. USEC Brief at 55-59; Gov't Brief at 10, 34-39. The fact that importers are not restructuring their transactions to take advantage of *Eurodif* (and, indeed, could not do so without committing economic suicide by eliminating all domestic sales of toll produced imported goods) demonstrates the fallacy underlying the argument that *Eurodif* has opened a loophole in the antidumping law.

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[34] Section 1677a(e) specifically refers to transactions by affiliated parties, but the same principle applies to unaffiliated transactions under Section 1677a(d)(2).

[35] The Government suggests that importers could evade the antidumping law by toll producing manufacturing equipment for their own use. Gov't Brief at 36. In the unlikely event there were an established industry practice for manufacturers to produce their own manufacturing equipment through tolling contracts, then as with LEU imported under enrichment services contracts, there would be no sale of subject merchandise and no dumping. That is not a loophole; rather, it is the application of the statute as enacted by Congress.

Commerce retains authority to remedy situations in which there has been actual circumvention of the antidumping law. *See* 19 U.S.C. § 1677j. However, it is uncontested that the transactions at issue in this case were not set up to evade the law. As the CIT noted:

> As we stated in *USEC I*, "[t]he crucial finding in *Polyvinyl Alcohol from Taiwan* was that, under the circumstances, Perry had simply restructured its payments to Chang Chun in an effort to circumvent the antidumping duties." . . . Unlike the contract referred to in the *Remand Redetermination*, the SWU contracts here are not simply restructured purchase contracts.

*USEC II*, 281 F. Supp. 2d at 1341 n.7, Gov't App. 48a-49a (internal citations omitted). Indeed, the Government admits that the use of enrichment services contracts was established by the U.S. Government itself in the 1960s. Gov't Brief at 5 n.2 (quoting *USEC I*, 259 F. Supp. 2d at 1316, Gov't App. 185a-87a). Because enrichment services contracts are not circumvention, they are not sales of subject merchandise under the antidumping statute.

## III. Petitioners' Claims That The Eurodif Decisions Negatively Impact U.S. Foreign Policy And National Security Interests Are Inapposite And Factually Incorrect

USEC and the Government argue that U.S. energy, national security and foreign policy objectives support overturning the *Eurodif* decisions. USEC Brief at 55-59; Gov't Brief at 37-39. They claim that without antidumping restrictions on Russian commercial enrichment services, Russia will abandon the HEU Agreement and threaten USEC's ability to support U.S. defense programs. These policy arguments are irrelevant to the legal issues at bar, which involve application of the antidumping law to sales of French enrichment services. Policy determinations on the best way to maintain defense programs and whether or how the government should give special support to a private company such as USEC are appropriately left to Congress, not the courts. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000) ("It suffices that the natural reading of the text produces the result we announce. Achieving a better policy outcome . . . is a task for Congress, not the courts . . . ," citing *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998)). Even on their face, however, the policy arguments made by USEC and the Government are unsupported by the facts. The *Eurodif* decisions neither undermine U.S. defense programs nor create an incentive for Russia to abandon the HEU Agreement at any time before its expiration in 2013.

USEC suggests that allowing sales of Russian commercial enrichment services would harm USEC commercially and consequently undermine U.S. production of tritium used for nuclear weapons and the supply of HEU for the U.S. Navy. USEC Brief at 55. There is no basis, however, for USEC's implicit claim that its financial success is critical to the U.S. Government's supply of enriched uranium for defense needs. Rather, the United States can readily obtain enriched uranium from its own HEU surplus stockpile, from private companies specifically licensed to supply fuel to the Navy, and if necessary by taking over the enrichment facilities it leases to USEC.

Specifically, after the Cold War the United States was left with a stockpile of enriched uranium sufficient to cover U.S. defense and nuclear propulsion needs for the next fifty years or more. International Panel on Fissile Materials, *Global Fissile Material Report* at 11 n.19 (2007), *available at* http://www.fissilematerials.org/ipfm/site_down/gfmr07.pdf (noting 40-60 year stockpile of naval reactor fuel and reporting Energy Secretary Bodman's comment that the stockpile "will have the added benefit of postponing the need for construction of a new uranium-enrichment facility for at least fifty years"); Dep't of Energy, *HEU: Striking A Balance* 37-46 (2001), *available at* http://www.ipfmlibrary.org/doc01.pdf (describing U.S. HEU stockpiles and needs). The U.S. Government can obtain its tritium either from this stockpile or by recycling tritium from nuclear warheads being decommissioned as part of its nuclear arsenal reduction process. *See, e.g.*, Congressional Research Service, *Issue Brief 97002:*

*The Department of Energy's Tritium Production Program* (1997), *available at* http://handle.dtic.mil/100.2/ADA323809. USEC does not supply enriched uranium or enrichment services to the Navy; a company named Nuclear Fuel Services is the only supplier of fuel for the Navy. *See* Daniel Horner, *Babcock and Wilcox to Acquire Downblending Competitor*, Nuclear Fuel, 2008 WLNR 17017489, Aug. 25, 2008. In any event, the U.S. Government owns both the enrichment facilities leased by USEC and could reclaim those facilities if additional enrichment were needed for tritium production or the Navy. *See USEC Prospectus* (1998), J.A. 76.

Petitioners assert that interpreting the statute to disallow unlawful antidumping restrictions on enrichment services would undermine the HEU Agreement. Gov't Brief at 37-39; USEC Brief at 55-59. However, the purpose of the HEU Agreement was not to subsidize a private company by giving it monopoly control over enrichment services from Russia. Rather, the HEU Agreement was negotiated as a government-to-government agreement to provide for the downblending of Russian HEU, keeping Russian nuclear experts employed to discourage proliferation activities, and providing funding for Russia to secure its nuclear materials. Thomas Neff, *Privatizing U.S. National Security: The U.S.-Russian HEU Deal At Risk*, Arms Control Today, Aug.-Sept. 1998, *available at* http://www.armscontrol.org/act/1998_08-09/tnas98. The Agreement's purpose was to provide for the downblending of weapons material in a way that

maximized the overall economic benefit for both parties. *See* HEU Agreement Art. I.[36]

Petitioners' speculation that Russia will abandon the HEU Agreement if commercial sales are permitted is baseless for several reasons. First, the Russian parliament recently voted overwhelmingly to continue government-to-government nuclear nonproliferation programs with the United States, including the HEU Agreement. *See* Sen. Richard Lugar, *Trust Still Needs Verification*, Wash. Times, July 18, 2008.[37] Second, blending down HEU provides Russia with access to the underlying uranium, which is currently in short supply in Russia. *Uranium from Russia*, USITC Pub. 3872, Inv. No. 731-TA-539-C (2nd Rev.) (Aug. 2006), at 39-41 (Lane, dissenting) (noting tight Russian supply, and citing World Nuclear Ass'n, *The Global Nuclear Fuel*

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[36] *See* HEU Agreement *supra* n.19. The Government and USEC suggest that the Russian Suspension Agreement was designed to block commercial enrichment services so that the HEU Agreement would be successful. If that were the case, the Suspension Agreement would not have had an initial termination date of 2004 when the HEU Agreement was expected to continue until 2013.

[37] A USEC representative was recently quoted as stating that "[t]he company has been given 'no reason for concern' that it might lose its Russian supply [of enrichment services] over the situation in Georgia." G. Sam Piat, *USEC Doesn't Expect Materials to be Cut Off*, Portsmouth Daily Times, Aug. 18, 2008, *available at* http://www.portsmouth-dailytimes.com/ articles/ 2008/08/18/news/7news_usec.prt. USEC's argument in this case that it expects Russia to breach the HEU Agreement for commercial reasons, while simultaneously disclaiming concern over the current geopolitical situation between the United States and Russia, rings hollow.

*Market – Supply and Demand 2005-2030* (2005) ("WNA, 2005"), at Figs. 5.5-5.7), *available at* http://hotdocs.usitc.gov/docs/pubs/701_731/pub3872.pdf. Russia needs that uranium to supply its own nuclear power plants as well as the many nuclear power plants being built in China and India. *Id.* at 41, 43 (citing WNA, 2005 at 180). Third, U.S. utilities have already entered into long term contracts for the great majority of their demand for enrichment services over the next five years, leaving relatively little available demand potentially to be filled by Russian commercial SWU, which itself has been largely committed under long term contracts to non-U.S. customers. *Id.* at 44-45. Consequently, it would be commercially illogical for Russia to abandon guaranteed sales to USEC under the HEU Agreement in favor of unlikely sales to U.S. utilities during that time period.

In sum, USEC and the Government provide no reasonable justification for this Court to overturn the settled and unambiguous meaning of the antidumping law in order to accommodate purported policy concerns that have nothing to do with the subject of that law.

## CONCLUSION

For the foregoing reasons, the *Eurodif* decisions should be affirmed in their entirety.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,
*Petitioner,*

*v.*

EURODIF S.A., *et al.*,
*Respondents.*

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USEC, INC., *et al.*,
*Petitioners,*

*v.*

EURODIF S.A., *et al.*,
*Respondents.*

---

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## BRIEF FOR RESPONDENTS EURODIF S.A., AREVA NC S.A., AND AREVA NC INC.

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## QUESTION PRESENTED

In a uranium enrichment services transaction, an enricher receives unenriched uranium from an electric utility, and returns enriched uranium in which the fissionable isotope has been concentrated according to the utility's specifications. The utility retains title to uranium throughout this process. The enricher charges the utility only for the enrichment processing that it provides; it does not charge any price for uranium, which the utility itself has supplied.

Did the court of appeals correctly hold that the antidumping statute, 19 U.S.C. § 1673 *et seq.*, which imposes duties only on sales of merchandise, does not reach sales of uranium enrichment services?

## CORPORATE DISCLOSURE STATEMENT

Eurodif S.A. is owned by AREVA NC S.A. (44.653%) (formerly named COGEMA S.A.), Sofidif (25%), Synatom (11.111%), Enusa (11.111%), and Enea (8.125%). AREVA NC Inc. (formerly named COGEMA, Inc.) is wholly owned by AREVA NC S.A., which is, in turn, wholly owned by AREVA, a publicly held company. Sofidif, Enusa, and Enea are not publicly held companies. Synatom is owned by Electrabel S.A., which is owned by GDF Suez, a publicly held company.

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## BRIEF FOR RESPONDENTS EURODIF S.A., AREVA NC S.A., AND AREVA NC INC.

### STATUTORY PROVISIONS INVOLVED

Sections 1673, 1677a, and 1677b of Title 19 of the United States Code are reproduced in the appendix to this brief. App. 1a-30a.

### STATEMENT OF THE CASE

Eurodif S.A. is a French company that enriches uranium for use by electric utilities in their nuclear reactors. AREVA NC S.A. and AREVA NC Inc. sell enrichment services on Eurodif's behalf.[1] This case concerns the United States Department of Commerce's application of the antidumping statute, which by its express terms reaches only the sale of merchandise, to Eurodif's sale of uranium enrichment services.

#### A. The Statutory Scheme

First enacted in 1921, *see* Antidumping Act, 1921, ch. 14, 42 Stat. 9 (repealed 1979), the antidumping law addresses international price discrimination in the sale of foreign merchandise. From its inception, including through multiple amendments of the statute, its scope has been restricted to "merchandise . . . sold . . . in the United States." *Id.* § 201(a); 19 U.S.C. § 1673(1).[2]

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[1] Eurodif S.A., AREVA NC S.A., and AREVA NC Inc. are herein collectively referred to as "Eurodif."

[2] In 1979, Congress repealed the Antidumping Act of 1921 and inserted a new antidumping law into the pre-existing Tariff (Cont'd)

Foreign goods are "dumped" if they are sold in the United States for a lower price than in the seller's home market (or, if a home-market price is not available, for less than other specified benchmarks). 19 U.S.C. §§ 1677(34), 1677a, 1677b. Thus, the U.S. sale price of foreign goods is at the crux of dumping. Only a party that sells, and thus sets the price of, foreign goods can engage in price discrimination; hence, only such a party can engage in dumping.

Dumping duties may be imposed on sales of "subject merchandise"[3] only if Commerce determines, using a methodology mandated in the statute, that "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." *Id.* §§ 1673(1), 1677a, 1677b; *see also id.* § 1677(34) ("dumping [is] the sale or likely sale of goods at less than fair value").

Only by analyzing the price at which merchandise is sold can Commerce determine if dumping is taking place. Sale price is, of course, fixed by agreement of the parties to the transaction, and such agreements are therefore the focus of a dumping investigation.

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(Cont'd)

Act of 1930. Trade Agreements Act of 1979, Pub. L. No. 96-39, §§ 101, 106, 93 Stat. 144, 150-89 (codified at 19 U.S.C. § 1673 *et seq.* (1994)). The new statute, insofar as relevant here, uses substantially the same language as the 1921 law and was "intended to re-enact the [same] basic standard for imposition of antidumping duties." S. Rep. No. 96-249, at 61 (1979); *id.* at 107.

[3] "[S]ubject merchandise means the class or kind of merchandise that is within the scope of an investigation" under the antidumping law. 19 U.S.C. § 1677(25).

Specifically, Commerce must compare the price at which the merchandise is sold to or in the United States (the "export price," or, in some cases, "constructed export price"),[4] with the "normal value" of the merchandise (generally, the price in the seller's home market). *Id.* §§ 1677a, 1677b. In calculating the U.S. price, Commerce must begin with the "price at which the subject merchandise is first sold." *Id.* § 1677a(a),(b). That price is then subject to specifically enumerated adjustments. *Id.* § 1677a(c),(d).

Once the U.S. price of merchandise is established, Commerce must then compare it with the "normal value" of the merchandise to determine if there has been a sale at less than the latter amount (*i.e.*, a sale at "less than fair value"). 19 U.S.C. § 1677b(a). The preferred measure of normal value is the price at which the merchandise is sold in the exporter's home market. *Id.* § 1677b(a)(1)(B). If home-market sales cannot be used, however, normal value will be based on either the sale price in third-country markets, *id.* § 1677b(a)(1)(B)(ii),(C), or the "constructed value" of the merchandise, *id.* § 1677b(a)(4).[5] The amount, if any, by

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[4] "Export price" and "constructed export price" are referred to herein as the "U.S. price." "Export price" is the price at which merchandise is sold before importation to an unaffiliated purchaser in, or for exportation to, the United States. 19 U.S.C. § 1677a(a). "Constructed export price" is used when the sale occurs after exportation to the United States, or is made by an affiliate of the producer or exporter. *Id.* § 1677a(b).

[5] "Constructed value" is the sum of the seller's: cost of production; selling, general, and administrative expenses; and (Cont'd)

which normal value exceeds the U.S. price is known as the "dumping margin." *Id.* § 1677(35)(A).

If Commerce concludes that subject merchandise was sold at less than fair value, the International Trade Commission must determine whether there has been material injury or a threat thereof to a domestic industry. 19 U.S.C. § 1673(2). If so, Commerce will publish an antidumping duty order that directs Customs officers to assess a duty equal to the dumping margin. *Id.* §§ 1673e(a), 1673d(c)(2).

### B. Utilities' Procurement of Low Enriched Uranium

The production of nuclear fuel for use in electricity generation involves five discrete steps: (1) mining uranium ore and milling it into triuranium octoxide ($U_3O_8$), known as "yellowcake"; (2) converting yellowcake into uranium hexafluoride ($UF_6$), known as uranium "feed"; (3) processing, or "enriching" feed to create low enriched uranium ("LEU");[6] (4) converting LEU into uranium dioxide ($UO_2$) pellets; and (5) inserting pellets into fuel assemblies, for consumption in nuclear reactors. *See* Gov't Pet. App. 230a-31a; J.A. 40-41, 261. Only the

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(Cont'd)

profits for producing and selling the merchandise. 19 U.S.C. § 1677b(e). Constructed value was the basis of "normal value" in this case. J.A. 247-48.

[6] "Low enriched uranium" is used to power nuclear reactors. "High enriched uranium," or "HEU," has an assay of 20% or higher and is primarily used for military or research purposes. *See* J.A. 41 n.6.

third step—uranium enrichment—is at issue in this case. *See* Gov't Pet. App. 223a.

Enrichment is the process of concentrating the $U_{235}$ isotope, naturally occurring in uranium, to a level allowing for a controlled chain reaction of nuclear fission in a reactor. A fungible good, uranium feed is primarily composed of $U_{238}$, a non-fissionable isotope, but also has a $U_{235}$ concentration or "assay" of .711% by weight. To make uranium suitable for use as fuel, it must be enriched until the $U_{235}$ assay reaches a level of 3% to 5%. *See* Gov't Pet. App. 182a; J.A. 41.

No substance is added to uranium feed during the enrichment process. Rather, the $U_{235}$ contained in the feed is gradually concentrated until the desired assay is achieved. This process requires separating the feed into two streams: the LEU, in which the $U_{235}$ has been concentrated, and the leftovers (or "tails"), which have been significantly depleted of $U_{235}$. The total quantity of $U_{235}$ stays constant throughout the enrichment process; thus, the sum of the $U_{235}$ in the LEU and tails after enrichment is equal to the quantity of $U_{235}$ in the feed at the outset. *See* J.A. 41-42.

The amount of effort expended to enrich feed is measured, according to a standard, industry-wide formula, in "separative work units," or "SWUs." *See* Gov't Pet. App. 183a. The number of SWUs needed for enrichment depends on: the quantity of feed to be enriched; the quantity of LEU to be obtained; and the assays specified for both the LEU and tails. Varying any one of these factors will change the number of SWUs that are required for enrichment. Thus, a utility can

obtain a particular quantity of LEU at a given assay by supplying more feed and buying fewer SWUs, or by supplying less feed and buying more SWUs. *See id.* at 183a-84a; J.A. 178 n.15. Utilities calibrate the relative amounts of uranium feed and SWUs for each transaction in order to minimize their costs. *See* Gov't Pet. App. 205a n.15.

Ordinarily, utilities actively manage the entire nuclear fuel procurement process, contracting with separate vendors for each step of the process. *See id.* at 55a. For the enrichment step, utilities generally enter into SWU (or enrichment services) contracts with enrichers. Under a SWU contract, the utility is responsible for acquiring the requisite uranium feed. It provides its feed to the enricher, specifies the amount of LEU to be delivered and the product and tail assays, and purchases from the enricher the requisite number of SWUs.

SWU contracts were first developed by the U.S. government decades ago, for reasons wholly unrelated to the antidumping law. Under the 1946 and 1954 Atomic Energy Acts, private ownership of nuclear materials was prohibited. *Huffman v. W. Nuclear, Inc.*, 486 U.S. 663, 665 (1988); Atomic Energy Act of 1946, Pub. L. No. 79-585, § 5(a), 60 Stat. 765. In 1964, however, Congress amended the 1954 Act to allow electric utilities to own the uranium used in their reactors. *See* Private Ownership of Special Nuclear Materials Act, Pub. L. 88-489, 78 Stat. 602. Because the U.S. government was then "the only entity in the world with the facilities to . . . enrich[] uranium," Congress authorized it "to offer 'toll enrichment' services whereby utilities could obtain

unenriched uranium on the open market and have it enriched by the [government] for a fee." *Huffman*, 486 U.S. at 665; *see also* Gov't Pet. App. 186a. But the government "offered no other [goods or] services relating to the production of nuclear fuel." Gov't Pet. App. 186a. Thus, utilities purchased these goods and services separately, *see id.* at 186a; J.A. 278; Gov't Br. 5 n.2, resulting in a series of distinct transactions between utilities and the various commercial entities that mined, milled, converted, and enriched uranium, and fabricated fuel.

Today, utilities have the option of simply buying finished LEU from an enricher pursuant to an enriched uranium product ("EUP") contract. Under such a contract, the utility does not purchase feed on the open market; rather, it pays the enricher a price that covers both the enrichment process as well as the necessary uranium. *See* Gov't Pet. App. 182a-84a.

SWU contracts, however, continue to account for the overwhelming majority of sales made by enrichers.[7] By contracting separately for each step in the fuel production process, utilities can "manage costs and assure a steady and reliable supply of fuel," diversifying their sources and minimizing the risk of supply disruption. *Id.* at 55a.

SWU contracts and EUP contracts are fundamentally different transactions, as the Court of

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[7] *See* J.A. 53 ("Substantially all of USEC's revenue is derived from the sale of uranium enrichment services, denominated in SWU."); J.A. 283 (95% of a utility's contracts were for purchases of SWUs, rather than EUP).

International Trade recognized. *See id.* 46a-49a. For example:

- SWU contracts provide that utilities retain title to uranium throughout the enrichment process. *See* C.J.A. 17, 87, 140, 188, 267; Gov't Pet. App. 184a-85a. Under EUP contracts, enrichers hold title to uranium until they transfer ownership of the complete LEU product to utilities. *See* C.J.A. 333, 392.

- SWU contracts require utilities to provide all of the uranium feed necessary for the quantity of LEU that they will receive. *See, e.g.*, C.J.A. 13-14, 83-84, 140, 142, 182-84, 268-70. By contrast, under EUP contracts, enrichers must procure the feed.

- Utilities bear the significant risk of uranium price fluctuations under SWU contracts, but not EUP contracts. *See* Gov't Pet. App. 55a; J.A. 279-80.

- Price is calculated in a SWU contract on a per-SWU basis for the total SWUs necessary to enrich the feed, according to the utility's product and tails assay specifications; no price is charged for uranium. *See* C.J.A. 26, 97, 134, 199, 276. Under an EUP contract, price is based on the weight of LEU, reflecting both enrichment and the necessary uranium. *See* C.J.A. 335-36, 393.

- Since uranium feed is a major component of the value of LEU, *see, e.g.*, Gov't Pet. App 239a, a utility will pay significantly more to an enricher for a given amount and assay of LEU under an EUP contract than under a SWU contract.

## C. Proceedings Below

### 1. Commerce's Initial Determination

In December 2000, USEC filed an antidumping petition with Commerce regarding LEU imported from various countries, including France.[8] J.A. 38. The petition purported to cover transactions under both SWU and EUP contracts. The five SWU contracts between Eurodif and various American utilities generally provide that for a period of approximately five years, Eurodif shall supply a percentage of the contracting utility's total SWU requirements. *See* C.J.A. 9-10, 77, 128-29, 176, 262-63. Each contract stipulates that the utility will provide Eurodif with all necessary uranium feed; the utilities will retain title to the uranium feed throughout the enrichment process; and the price will be determined on a per-SWU basis. Under each contract, Eurodif is to deliver LEU pursuant to periodic notices from the utility specifying the quantity of feed the utility will provide, the quantity of LEU to be

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[8] Commerce later determined that LEU from the other countries was not being sold at less than fair value. *See Low Enriched Uranium from the United Kingdom, Germany and the Netherlands*, 66 Fed. Reg. 65886 (Dep't Commerce Dec. 21, 2001).

returned to the utility, and the product and tails assays for each LEU delivery. *See* C.J.A. 11-12, 81-82, 131-33, 179-81, 266.

Eurodif opposed USEC's petition insofar as it covered SWU contracts. Eurodif argued that because the antidumping law operates only against sales of merchandise, SWU transactions, which are sales of services, cannot give rise to dumping duties. *See* J.A. 112-22, Gov't Pet. App. 228a.

Commerce found that the antidumping law reaches SWU transactions. *See* Gov't Pet. App. 220a; *see also* J.A. 238. Its determination rested on two assertions: first, that "the application of the [antidumping law] does not depend on whether a producer/exporter sells an input to the subject merchandise, or the subject merchandise itself," Gov't Pet. App. 241a; and second, that "there is little substantive commercial difference between [SWU and EUP] transactions." J.A. 245. Indeed, Commerce stressed its view that SWU and EUP contracts are "functionally equivalent," since both types of contracts share the objective of "delivery of LEU." Gov't Pet. App. 255a.

Commerce further concluded that imposing dumping duties on SWU transactions would be consistent with its "tolling" regulation. *Id.* at 250a-51a. That regulation—which Commerce abruptly withdrew while the petitions for certiorari were pending in this case, *Withdrawal of Regulations Governing the Treatment of Subcontractors*, 73 Fed. Reg. 16517 (Dep't Commerce Mar. 28, 2008)—provided that Commerce "will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not

control the relevant sale, of the subject merchandise or foreign like product." 19 C.F.R. § 351.401(h).[9] In other words, a toller's transactions will not be used to calculate U.S. price or normal value. Commerce dismissed Eurodif's argument that, under this regulation, enrichers do not own or control the sale of LEU and thus the sale of enrichment services could not be considered a relevant sale under the antidumping law. *See* Gov't Pet. App. 248a.

Commerce also rejected Eurodif's position that no U.S. price or normal value of LEU can be calculated for a SWU transaction because the price term reflects only the value of enrichment. *See id.* at 244a-45a. Commerce, however, faced a conundrum: in its SWU transactions, Eurodif received "a cash payment covering only the value of the enrichment component" of LEU. J.A. 248. Because the subject merchandise is LEU, and not enrichment, Commerce purported to "translate[] prices and costs involved in SWU contracts to an LEU basis, increasing those values to account for the cost of the uranium feedstock involved." J.A. 248. It did so by "assigning a specific monetary value to the natural uranium component" of LEU and adding it to both the SWU price charged to U.S. utilities and the calculated "normal value" of LEU in France. Gov't Pet. App. 257a.

Commerce recognized that "no specific statutory provision" authorized its addition of an assigned uranium value to Eurodif's actual SWU prices and costs, but found that "the absence of such a provision does not render the law inapplicable to Eurodif's SWU contracts. *Id.* at 233a.

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[9] A "toller" (or subcontractor) sells to a "tollee" (or contractor) certain processing of, or material inputs to, subject merchandise. *See* Gov't Pet. App. 48a.

### 2. Proceedings Before the Court of International Trade

**Initial Appeal.** On appeal, the Court of International Trade ("CIT") unanimously reversed Commerce's determination as neither supported by substantial evidence nor in accordance with law. *See* Gov't Pet. App. 178a. The court rejected Commerce's finding that SWU and EUP transactions are functionally equivalent because it "fails to take into account a critical difference between the two transactions: what is purchased." *Id.* at 204a. In EUP transactions, the CIT observed, "[u]tilities pay the seller a price that reflects all elements of the value of the LEU." *Id.* at 204a-05a. SWU transactions, by contrast, "do not include the [utility's] cost or responsibility for providing the uranium feed." *Id.* at 205a. Accordingly, SWU "contracts specify that the only payment to be made by the utility is for the enrichment services to be provided, on a price-per-SWU basis." *Id.* Thus, unlike EUP transactions, SWU transactions "do not contemplate the sale of a complete product." *Id.*

The CIT also focused on the inconsistency between Commerce's determination and its tolling regulation and prior related decisions. *See* Gov't Pet. App. 207a. Because a toller does not sell all components of the merchandise's value, the CIT explained, the toller sets only the price of the processing or inputs that it provides, not the price of the subject merchandise. *See id.* at 192a. But in conducting a dumping investigation, Commerce must compare the U.S. price and normal value of subject merchandise, "'not the price of some processing of the subject merchandise.'" *Id.* at 192a n.10

(quoting Decision Memorandum: Treatment of DuPont's Sales of Polyvinyl Alcohol Tolled by Chang Chun in the Antidumping Investigation of Polyvinyl Alcohol from Taiwan, August 8, 1995, at 4). Thus, in numerous cases addressing tolling arrangements, "Commerce has recognized that where the price paid for subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping duty law." *Id.* at 205a-06a. The CIT remanded the determination to Commerce, instructing that "Commerce's decision requires a more persuasive explanation than provided in the agency's determinations." *Id.* at 207a.

**Remand Proceedings.** On remand, Commerce adhered to its original determination. Gov't Pet. App. 69a-177a. It found its tolling regulation inapplicable to SWU transactions because the tollees (*i.e.*, the utilities) never sell the subject merchandise in the United States. *See id.* at 122a-24a. Commerce held that it could rely on SWU sales to determine whether merchandise is sold at less than fair value because "the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value." *Id.* at 126a.

Commerce also found that the SWU transactions constitute a sale of merchandise under *NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997), in which the Federal Circuit held that, for the purpose of the antidumping law, a sale requires both transfer of ownership and consideration. *See* Gov't Pet. App. 134a. Commerce asserted that under SWU contracts, the utilities retain title to the uranium feed they provide

until delivery of the associated LEU. *See id.* at 132a. Relying on this point, the agency inferred that "[t]he enricher, by contrast, would have rights as to the LEU" until delivery, and thus "that the enrichers transfer title to, and ownership of, the complete LEU." *Id.* at 133a, 134a.

The CIT unanimously rejected Commerce's remand redetermination. *Id.* at 67a. The court found no "evidentiary or legal basis" for Commerce's "conclusion that the enricher obtains ownership over the LEU and then sells it to the utility." *Id.* at 45a. Rather, the CIT held, "the enricher does not obtain ownership of the LEU enriched under SWU contracts," and thus "the transfer of LEU by the enricher to the utility cannot constitute a sale of merchandise under *NSK*." *Id.* at 45a. The CIT also again rejected Commerce's finding that SWU and EUP contracts are "functionally equivalent." "The SWU transaction," the CIT noted, "accounts only for the value of the enrichment processing," not the value of the LEU itself, as in an EUP transaction. Gov't Pet. App. 47a.

Addressing whether Commerce could treat a sale of enrichment services as a cognizable sale of merchandise, the CIT observed that "utilities manage the entire process of creating nuclear fuel. . . . Enrichment is merely one step in this process, and the utilities obtain it by providing a raw material to a subcontractor and paying for the service of enrichment." *Id.* at 55a. Thus, there is no "basis for determining that the tolling arrangements at issue here"—*i.e.*, SWU transactions—"constitute sales that may be considered equivalent to the full-value sale of a finished product."

*Id.* at 56a. "[T]he fact that the utilities do not . . . sell the finished product, but rather consume it," the CIT held, does not allow Commerce to impose dumping duties on sales of a processing service. *Id.*

### 3. Interlocutory Appeal and Rehearing Before the Federal Circuit

On interlocutory appeal ("*Eurodif I*"), the Federal Circuit unanimously affirmed, holding that "the SWU contracts at issue in this case were contracts for the provision of services and not for the sale of goods," and thus outside the scope of the antidumping law. Gov't Pet. App. 24a. Like the CIT, the Federal Circuit rejected petitioners' contention that title to LEU passes from Eurodif to the utilities, finding that "the SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU." *Id.* at 20a. The court also observed that the United States had successfully argued in a prior case that SWU transactions are not sales of goods, and thus not subject to the Contract Disputes Act. *See id.* at 17a-18a (discussing *Fla. Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002)). The antidumping law was necessarily inapplicable here as well, the Federal Circuit held, where the "utilities bought [SWUs] from enrichers" and "delivered unenriched uranium and monetary compensation to enrichers in return for enrichment services." *Id.* at 24a.

While rehearing petitions were pending, this Court issued its decision in *National Cable & Telecommunications Association v. Brand X Internet*

*Services*, 545 U.S. 967 (2005), which held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982. The Federal Circuit granted rehearing for the sole purpose of addressing *Brand X*, and in all other respects affirmed its prior decision. *See* Gov't Pet. App. 30a. The full court denied rehearing *en banc*. *Id.* at 29a-35a.

On rehearing ("*Eurodif II*"), the Federal Circuit reaffirmed that SWU contracts are not subject to the antidumping law. It expressly found that "the antidumping duty statute *unambiguously* applies to the sale of goods and not services." *Id.* at 33a (emphasis added). Pointing to the "inescapable conclusion . . . that the enrichers do not 'sell' LEU to utilities pursuant to . . . SWU contracts," the court "reject[ed] Commerce's application of the antidumping duty statute to the SWU contracts." *Id.* at 33a-34a.

### 4. Subsequent Proceedings

On further remand, the CIT instructed Commerce to "explain how its final determination and order on remand has eliminated all SWU transactions" as required by *Eurodif I* and *Eurodif II*. Gov't Pet. App. 2a. When Commerce declined to modify the antidumping duty order accordingly, the CIT again remanded to Commerce. After Commerce issued a conforming antidumping duty order, the CIT entered judgment. *Id.* at 2a-3a.

USEC and the United States appealed to the Federal Circuit. The court dismissed the appeal as unripe, explaining that "the issues appellants raise . . . concern only the application of [*Eurodif I and II*] to future entries of [LEU]." *Id.* at 2a.

This Court granted the petitions for writs of certiorari on April 21, 2008.

## SUMMARY OF ARGUMENT

Section 1673 of the antidumping law permits the Department of Commerce to impose dumping duties only if "merchandise [is] sold" at less than fair value. 19 U.S.C. § 1673. This phrase unambiguously requires a transfer of ownership in a tangible good and does not reach the sale of uranium enrichment services. Accordingly, Commerce's contrary interpretation of the statute is foreclosed under *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as the Federal Circuit held.

While petitioners argue that the operative words of section 1673 are ambiguous and that Commerce's interpretation of the provision therefore must be accorded deference, the ordinary meanings of the terms "merchandise" and "sold" require a transfer of ownership. Petitioners rely on a handful of cases construing unrelated statutes and involving transactions that were not structured as direct sales but nonetheless accomplished a transfer of ownership. Eurodif's SWU transactions, by contrast, involve no transfer of ownership and were not structured to avoid the antidumping law. They are an exchange of enrichment

services for money. The utilities with whom Eurodif contracts provide uranium feed for enrichment; the enrichers do not own either the feed or the LEU, and thus cannot transfer ownership of it.

The plain meaning of section 1673 is consistent with the law's structure and purpose, as well as the construction given to other statutes regulating sales of merchandise. Several provisions of the antidumping law and a companion trade statute (the countervailing duty law) demonstrate not that Congress blithely sought to subject every conceivable transaction to dumping duties, but rather that it crafted the scope of the statute with precision. Moreover, limiting the antidumping law to the sale of merchandise, as Congress instructed, ensures that duties will be imposed only against an entity that actually sells merchandise in this country at a discriminatory price—the fundamental concern of the statute.

Petitioners' related contention, that Commerce can treat a transaction for a single component of a manufacturing process as "merchandise . . . sold," is contrary to the plain meaning of section 1673. As Commerce itself has repeatedly acknowledged until this case, the antidumping law requires it to compare the price and normal value of merchandise, not of the processing of the merchandise. While the United States has withdrawn its regulation addressing this point and seeks to disavow its position before this Court, it cannot simply ignore the text and logic of the statute.

Nothing about Eurodif's SWU contracts somehow injects ambiguity into section 1673 or allows Commerce

to treat a sale of uranium processing services as a sale of merchandise. As both courts below found, these contracts establish on their face that Eurodif never acquires or transfers title to uranium feed or LEU, and the price term in the contracts confirms the utilities' sole ownership of the uranium. The substance of Eurodif's contracts is consistent with their form; under the SWU contracts, utilities provide Eurodif with the feed they want enriched, and the utilities bear the cost and risk associated with these purchases. Indeed, for these very reasons, the United States has repeatedly taken the position, and courts have agreed, that SWU transactions are sales of enrichment services, not LEU.

Petitioners also claim that the antidumping law can be read to cover SWU transactions because they are supposedly equivalent to EUP transactions. That contention is contradicted by the language of the contracts themselves and by their economic realities, as the courts below found.

Not only does the text of section 1673 unambiguously exclude SWU contracts for enrichment services, but Commerce was forced to disregard the statutory requirements for calculating dumping margins in its attempt to stretch the statute to cover these contracts. The statute directs Commerce to use the actual price at which merchandise is sold, subject to enumerated adjustments, in determining whether dumping has occurred. Commerce could not and did not do so here; because Eurodif never sold LEU and therefore never charged a price for it, Commerce assigned an artificial value to the uranium feed that Eurodif processed. Commerce's resort to this unauthorized maneuvering

confirms that Congress did not intend for the statute to apply to these transactions.

Even if this Court were to identify some ambiguity in the plain words of section 1673, Commerce's application of that provision to the facts here is unreasonable and thus fails under step two of *Chevron*. The agency's characterization of Eurodif's contracts has no basis in the record, and its construction of the statute ignores the key aim of the antidumping law. Because Eurodif does not set the price for the full value of LEU, it cannot engage in price discrimination, and its sales of processing services are thus outside the ambit of the statute.

Finally, even if policy consequences could be deemed relevant to ascertaining the plain meaning of section 1673, petitioners' claims on this front are misplaced. The Federal Circuit's interpretation of section 1673 does not create any "loophole" in the antidumping law; in circumstances where production is segmented into separate transactions for raw materials and processing, any applicable dumping duties could be imposed upon the first downstream sale of subject merchandise. Nor is any purported risk of threatened imports of Russian LEU a reason to misconstrue the antidumping law's clear language. Even without resorting to dumping duties, the Executive possesses ample authority under existing law to restrict such imports, and Congress is considering legislation that would do so as well. Moreover, expansion of the antidumping law in the manner proposed by petitioners would be inconsistent with the United States' international obligations and

would undermine the principles of competition embodied in the antitrust laws, to the detriment of U.S. consumers and the economy as a whole.

## ARGUMENT

### I. SECTION 1673 OF THE ANTIDUMPING LAW UNAMBIGUOUSLY LIMITS ANY FINDING OF DUMPING TO TRANSACTIONS INVOLVING A TRANSFER OF OWNERSHIP IN A TANGIBLE GOOD.

As the courts below correctly held, SWU transactions are sales of only enrichment services, not merchandise, and therefore the antidumping law by its express terms does not reach those sales. Gov't Pet. App. 33a. Under *Chevron*'s two-step framework for reviewing agency interpretations of a statute, a court must first ask whether the statute is ambiguous with respect to the question at issue. *See Brand X*, 545 U.S. at 986. If the terms of the statute are clear, the agency must adhere to them. If "the devices of judicial construction have been tried and found to yield no clear sense of congressional intent," a reviewing court must defer to the agency's interpretation, if it is reasonable.[10] *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004); *Brand X*, 545 U.S. at 986.

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[10] The United States argues that "the antidumping-duty statute does not directly speak to the precise question" of whether "goods . . . acquire[d] through contract-manufacturing arrangements" are exempt from the antidumping law. Gov't Br. 23. But a statute is not ambiguous simply because Congress has not spelled out every possible circumstance in which it might be applied. Were that so, deference would be due an agency in virtually every instance.

Section 1673 is unambiguous in its scope: it covers only transactions that involve a transfer of ownership in a tangible good, and not sales of services. Because Congress was clear on this point, no deference is owed to Commerce's effort to fit a services transaction into the ambit of the antidumping law. *See Chevron*, 467 U.S. at 842-43.

### A. The Phrase "Merchandise . . . Sold" Is Unambiguous.

Section 1673 expressly conditions the imposition of dumping duties on a finding that "foreign merchandise" is "sold in the United States at less than its fair value." 19 U.S.C. § 1673(1); *see also id.* § 1677(34) ("dumping" entails a "sale of goods"). The terms "sold" and "merchandise" are not defined in the statute. Accordingly, they should be "interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co. v. Burton*, __ U.S. __, 127 S. Ct. 638, 643 (2006).

The term "merchandise" means a tangible good or commodity that can be bought and sold. *See, e.g.*, THE SHORTER OXFORD ENGLISH DICTIONARY (1st ed. 1933) ("[t]he commodities of commerce; movables which may be bought and sold"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987) (unabridged) ("manufactured goods bought and sold in any business"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2002) (unabridged) ("commodities or goods that are bought and sold in business").

The term "sale" means a transfer of ownership in property in exchange for consideration. *See* WEBSTER'S

NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1923) (unabridged) ("a contract whereby the absolute, or general, ownership of property is transferred from one person to another for a price"); THE SHORTER OXFORD ENGLISH DICTIONARY (1st ed. 1933) ("the exchange of a commodity for money or other valuable consideration"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) (unabridged) ("transfer of such ownership of and title to . . . personal property (as existing identifiable movable and tangible or fungible goods) under a contract by the seller to the buyer for a price"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987) (unabridged) ("transfer of property for money or credit").

The Federal Circuit has confirmed that "Congress intended to give the term ['sold'] its ordinary meaning," namely, a transfer of ownership for consideration. *NSK*, 115 F.3d at 975. In light of the lack of any ambiguity on this point, Commerce's reading of the statute as encompassing a transaction for processing services alone is due no deference. The plain language of the statute resolves this case, as the Federal Circuit held below.

Rather than grapple in any depth with the text of the statute, petitioners instead claim to find ambiguity in section 1673 based on a handful of cases interpreting the term "sale" in unrelated statutory schemes. *See* Gov't Br. 29, 34-35; USEC Br. 30-31, 35. Petitioners rely on these cases for two points: that the term "sale" covers any transaction resulting in delivery of a commodity for a price, regardless of whether there is a transfer of ownership; and that only the substance, not the form,

of a transaction matters in determining whether it constitutes a "sale." *See* Gov't Br. 28-30, 34-35; USEC Br. 34-35.[11]

Preliminarily, the cited cases do not hold that the form of transactions can simply be ignored as a matter of course. *See* Gov't Br. 28-30, 34-35; USEC Br. 34-35. This Court has endorsed disregarding the actual terms of a contract only in limited circumstances not present here, such as where the form is "shaped solely by" an intent to circumvent a regulatory scheme and has "meaningless labels attached." *Frank Lyon Co. v. United States*, 435 U.S. 561, 583-84 (1978).

In any event, the key factor that led this Court to find a sale of goods in petitioners' cases, an effective transfer of ownership in a regulated asset, is missing here. In *United Gas v. Continental Oil Co.*, the Court examined a sale of natural gas strategically recast as a sale of leasehold interests in gas reserves. 381 U.S. 392, 400-01 (1965). At issue was whether the leasing arrangement fell within the Federal Power Commission's authority to regulate "the sale . . . of natural gas." *Id.* at 399-400. The "determinative economic fact," the Court explained, was that "the sales of these leases . . . accomplished the transfer of large amounts of natural gas." *Id.* at 401. Similarly, in *SEC v. National Securities, Inc.*, the Court treated a deceptively

[11] To the extent petitioners are suggesting that the term "sale" is inherently ambiguous for purposes of *Chevron*, that argument would plainly prove too much. Congress has used the term "sale" or its variants in many statutes, and the few cases that petitioners cite surely do not render it open to agency interpretation in every instance.

structured stock transfer as a "purchase or sale" of a security subject to SEC regulation. 393 U.S. 453, 467-68 (1969). Because the transaction at issue resulted in investors "becoming shareholders in a new company," the "purchase or sale" regulatory criteria were met. *Id.* at 467.

In contrast, the SWU transactions before Commerce do not effect a transfer of ownership in uranium. Nor were they designed to avoid application of the antidumping regime. Thus, these cases are inapposite and do not render section 1673 ambiguous.

USEC's related claim that the "technicalities of title" are of no consequence, USEC Br. 35, also fails. The economic realities and the governing contractual agreements in this case are fully consistent: both establish that no transfer of title or sale of LEU occurs. *See Frank Lyon*, 435 U.S. at 576-80. Petitioners' attempt to fit SWU transactions into a narrow line of cases involving "arbitrary labels and dealings that have no economic significance," *Id.* at 583, is therefore misplaced.[12]

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[12] *Boulware v. United States*, __U.S.__, 128 S. Ct. 1168, 1181 (2008), *see* Gov't Br. 35, USEC Br. 34, is likewise of no aid to petitioners. *Boulware* simply reiterated *Frank Lyon*'s observation that "tax classifications . . . turn on 'the objective economic realities of a transaction.'" *Boulware*, 128 S. Ct. at 1175. It provides no basis to recharacterize transactions where, as here, their structure reflects economic realities. Similarly, in *United States v. Sealy, Inc.*, *see* USEC Br. 34, the Court merely concluded that the transactions' economic substance established an impermissible horizontal restraint. 388 U.S. 350, 352-54 (1967).

Finally, *Gray v. Powell*, 314 U.S. 402 (1941), is particularly unhelpful to petitioners' effort to privilege supposed substance over form. In *Gray*, this Court considered whether a railroad's consumption of coal mined by a third party from land leased by the railroad triggered tax obligations accruing on a "sale *or other disposal* of bituminous coal." *Id.* at 414-17 (emphasis added). Although the railroad argued that no "sale" occurred because it continuously held title to the extracted coal, the Court noted that the statute applied to "'other disposal,' as well as sale," and that coal "may be disposed of" without a transfer of title. *Id.* at 416.

### B. The Antidumping Law's Structure and Purpose Confirm Its Plain Meaning.

#### 1. Related Statutory Provisions Underscore Congress's Intent That the Phrase "Merchandise . . . Sold" Be Given Its Ordinary Meaning.

While petitioners argue that two related provisions of the antidumping law indicate that Congress intended section 1673 to reach a broad swath of transactions, just the opposite is true. Those two provisions, along with a provision in a companion trade statute, confirm that Congress intended the phrase "merchandise . . . sold" to have its settled and ordinary meaning.

Petitioners first contend that an amendment to section 1673 providing that a "leasing arrangement . . . that is equivalent to the sale of the merchandise" may be subject to a dumping determination, 19 U.S.C. § 1673, shows that Congress was "concerned not just

with 'sales' in the narrowest sense."[13] USEC Br. 33; *see also* Gov't Br. 30-31. To the contrary, this provision confirms that Congress intended to cover only transactions within the ordinary meaning of a sale of merchandise, as shown by its view that even transactions "equivalent to the sale of . . . merchandise" warranted clarification as falling within the statute's reach.

Second, the United States argues that the inclusion of "likely" sales of merchandise within the statute's reach suggests an intent to also cover the transactions here. The statute covers likely sales so that Commerce may act when the terms of a sale have been agreed upon, but the sale has not yet been consummated. *See* H.R. Rep No. 98-725, at 11 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5127, 5137-38. But the nub of petitioners' argument is not that a sale of merchandise is likely to occur; it is that the phrase "merchandise . . . sold" is somehow broad enough to include a contract for processing services. In any event, this point proves too much. The United States claims that the likely-sale provision supports its interpretation because "it is impossible to know in advance the form that [a] transaction will take." Gov't Br. 30. That Congress expanded the temporal scope of the antidumping law in no way suggests that it also meant to cover every

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[13] The legislative history of this provision indicates that it was "intended to clarify the applicability of [the antidumping] law[] to sham leases or leases which are tantamount to sales." H.R. Rep. No. 98-725, at 11 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5127, 5137-38; *see also id.* at 6; H.R. Rep. No. 98-1156, at 165 (1984) (Conf. Rep.), *reprinted in* 1984 U.S.C.C.A.N. 5220, 5282. The Committee report explained that "[b]ecause of tax considerations or other business reasons, leasing arrangements are often utilized to accomplish what are in effect transfers of ownership." H.R. Rep. No. 98-725, at 11 (1984).

potential transaction, on the theory that some of them, once consummated, might constitute a sale of merchandise.

While not referenced by petitioners, there is a provision in the companion countervailing duty law that does illuminate the scope of the antidumping law. The countervailing duty law imposes duties upon the *importation* of subsidized merchandise into the United States, whereas the antidumping law requires that merchandise be *sold* here. *Compare* 19 U.S.C. § 1671, *with id.* § 1673. The countervailing duty law also defines "countervailable subsidies" to include the provision of services, whereas the antidumping law operates only against the sale of merchandise. *Compare* 19 U.S.C. § 1677(5)(D)(iii), *with id.* § 1673. Congress's determination that the countervailing duty law should reach more broadly in both respects demonstrates that it did not intend for dumping duties to be assessed upon the mere entry of merchandise into the United States, or the sale of services alone. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.") (internal quotation marks omitted).

### 2. The Antidumping Law's Purpose Is Furthered by Giving "Merchandise . . . Sold" Its Ordinary Meaning.

Petitioners also contend that the ordinary meaning of section 1673 is at odds with the purpose of the antidumping statute. *See* Gov't Br. 32-34; USEC Br. 29-30. References to broad goals of a statute, however, provide no basis for disregarding its plain text. Courts must presume that "a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see also Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.").

Moreover, petitioners' interpretation does not promote the antidumping law's purpose: "to prevent foreign manufacturers from injuring domestic industries by selling their products in the United States . . . at less than fair value." *SKF USA Inc. v. United States*, 180 F.3d 1370, 1371 (Fed. Cir. 1999). Even if it were true that a SWU contract and an EUP contract had a similar effect on a domestic industry, *see* Gov't Br. 33, an enricher cannot itself sell foreign merchandise in this country at a discriminatory price. In SWU transactions, enrichers sell, and set the price of, only enrichment, not LEU. Because enrichers are not price-setters of LEU, they cannot be price-discriminators as to LEU, and thus their conduct does not implicate the fundamental concern of the antidumping law.

### C. Section 1673's Plain Meaning Is Further Confirmed by the Construction of Other Statutes Regulating Sales of Merchandise.

Other statutes regulating sales of merchandise have likewise been held inapplicable to sales of processing services, suggesting that Congress intended the phrase "merchandise . . . sold" to have the same meaning. *See Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). For example, the Robinson-Patman Act ("RPA"), a statute that is in key respects the domestic equivalent of the antidumping law, addresses price discrimination, and applies only when "commodities are sold . . . within the United States." 15 U.S.C. § 13(a). Courts have repeatedly held that processing operations are service transactions outside the scope of the RPA, even when a processor provides tangible inputs. *See First Comics, Inc. v. World Color Press, Inc.*, 884 F.2d 1033, 1037 (7th Cir. 1989); *Aviation Specialties Inc. v. United Techs. Corp.*, 568 F.2d 1186, 1191 (5th Cir. 1978); *Gen. Shale Prods. Corp. v. Struck Constr. Co.*, 132 F.2d 425, 428 (6th Cir. 1942).

Of particular significance here are two additional statutes—the Uniform Commercial Code and the Contract Disputes Act—which have been held, at the United States' behest, not to reach SWU transactions because no goods are sold. *See infra* Point II.A.3.

### D. Commerce May Not Treat a Transaction for a Single Component of a Manufacturing Process as "Merchandise . . . Sold."

The United States contends that Commerce can subject each distinct component of a "contract manufacturing" process to dumping duties, provided that there is eventual "entry," "delivery," or "acquisition" of the product in the United States. Gov't Br. 19, 25-28, 48. But neither section 1673, nor any other provision of the antidumping law, makes any reference to those events as a trigger for the imposition of dumping duties. Instead, the statute requires that subject "merchandise [be] sold" to or in the United States. 19 U.S.C. § 1673.

Thus, the Federal Circuit, the CIT, and even Commerce have concluded that absent such a sale, the mere delivery or acquisition of foreign merchandise cannot give rise to dumping duties. For example, in *NSK*, U.S. parties acquired foreign merchandise that had been given to them as free samples. The Federal Circuit held that the provision of zero-priced samples could not be used to calculate the U.S. price of subject merchandise, since the merchandise had not been "sold" given the absence of any consideration. *See NSK*, 115 F.3d at 973-75. Similarly, Commerce, the CIT, and the Federal Circuit have held that dumping duties cannot be assessed on merchandise imported to the United States but then re-exported without being sold. *Torrington Co. v. United States*, 818 F. Supp. 1563, 1573 (Ct. Int'l Trade 1993), *aff'd* 82 F.3d 1039, 1047 (Fed. Cir. 1996); *Antifriction Bearings (other than Tapered Roller Bearings) and Parts thereof from the Federal Republic of Germany*, 56 Fed. Reg. 31692, 31743 (Dep't Commerce Jul. 11, 1991).

Moreover, the United States' position is inconsistent with the statutory criteria for determining whether merchandise has been sold at less than fair value. Commerce itself has acknowledged this very point until this case, repeatedly concluding that tolling transactions are not cognizable under the antidumping law because "a subcontractor's or toller's price does not represent all elements of value." Response to Court Remand, *Taiwan Semiconductor Mfg. Co., Ltd v. United States*, No. 98-05-02184, slip. op. at 5 (June 2, 2000)]. Thus, a subcontractor is not "in a position to set the price of the product, and by doing so, to sell at less than fair value in or to the U.S. market." *Id.* Accordingly, Commerce has concluded that it "*[does] not consider the 'sale' between the subcontractor and . . . contractor to be a sale of subject merchandise at all.*" *Id.* (emphasis in original).

Commerce expressly tied this conclusion to the text of the antidumping statute. It noted that the statute "define[s] 'export price' and 'constructed export price' as the price at which the subject merchandise is first sold to an unaffiliated purchaser." *Id.* at 3 (emphasis omitted). Pursuant to this definition, Commerce explained, the price cannot be derived from a subcontractor's sale, "[b]ecause a subcontractor does not sell 'subject merchandise,' but rather only sells services and/or inputs." *Id.*; *see also* Gov't Pet. App. 192a n.10 ("The statute requires that we base comparisons on the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold in the home or third country markets, not the price of some processing of the subject merchandise.").

The United States now claims that Commerce's prior interpretations of the statute are irrelevant because Commerce withdrew its tolling regulation more than seven years after the transactions covered in its investigation. *See* Gov't Br. 39-40 & n.7. Commerce's disavowal and withdrawal of its tolling regulation is an "irrational departure" from its clearly articulated policy on tolling transactions. *I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996). Moreover, because Commerce's current interpretation of section 1673 "conflicts with the agency's earlier interpretation, [it] is entitled to considerably less deference than a consistently held agency view." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). Commerce simply wishes to attach duties to transactions that, as its own decisions and (now withdrawn) regulation recognize, are not sales of merchandise and cannot be used to determine the price of such merchandise. But Commerce, like any agency, cannot simply disregard clear directives from Congress in pursuit of its own policy goals.

The United States also asks this Court to disregard its tolling regulation and decisions because they addressed how Commerce should calculate U.S. price and normal value, not whether merchandise would be excluded from a dumping investigation. Gov't Br. 40-41. This distinction, however, is of no consequence to the question at bar. As the CIT recognized, since the antidumping law prevents Commerce from basing U.S. price and normal value on SWU transactions, those transactions cannot give rise to dumping duties. *See* Gov't Pet. App. 206a; *cf.* Gov't Br. 40 n.7. The tolling regulation and decisions establish that the price charged by a subcontractor (or toller) for a single component of a "contract manufacturing" process is not the price of

subject merchandise itself, and hence the toller's sale is not cognizable under the antidumping law. Gov't Pet. App. 206a; *cf.* Gov't Br. 40 n.7.

The United States cannot avoid the logic or statutory directives behind the tolling regulation and decisions simply by pointing to supposed vague purposes of the antidumping law. *See* Gov't Br. at 41-42. The unique circumstances of this case—namely, that no party sells the subject merchandise in the United States—do not allow Commerce to rewrite the terms of the statute.[14]

## II. EURODIF'S SWU TRANSACTIONS ARE NOT SALES OF MERCHANDISE.

As demonstrated in Point I, the antidumping statute unambiguously precludes the imposition of dumping duties on a sale of processing services alone. Contrary to petitioners' contentions, nothing about Eurodif's SWU contracts allows a different result here.

First, both on their face and in substance, these contracts establish that Eurodif never acquires

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[14] Nor can the United States avoid the plain language of the antidumping law by pointing to its "broad range of alternatives" for calculating a dumping margin "where prices are not available for that purpose." Gov't Br. 42. While Commerce may impose dumping duties on, *inter alia*, a lease of merchandise that is equivalent to a sale, 19 U.S.C. § 1673, or upon resale of merchandise in the U.S. market by a buyer affiliated with the producer, *id.* § 1677a(b), Eurodif's SWU transactions do not fall within these provisions. Indeed, the statutory methodology effectively precludes calculation of a dumping margin in the circumstances here. *See infra* Point II.C.

ownership of uranium, in either unenriched or enriched form, at any time during the transaction. Thus, it could not transfer ownership back to utilities. Nor can the transformation of feed to LEU or the inherent fungibility of feed somehow confer ownership of LEU on an enricher when its contracts say otherwise.

Second, SWU transactions are not, as petitioners urge, "functionally equivalent" to EUP transactions. The crucial distinction between the two is that in SWU transactions, utilities supply their own feed and purchase only SWUs. In EUP transactions, utilities purchase LEU. Only through SWU transactions can utilities control each step of the process of procuring nuclear fuel, in order to manage risk and minimize costs.

Third, to convert SWU transactions into sales of LEU, rather than mere enrichment services, Commerce assigned an artificial value to uranium and added it to Eurodif's actual SWU prices and costs. That maneuver was inconsistent with the undisputed facts respecting Eurodif's SWU transactions and the antidumping law's provisions governing the calculation of U.S. price and normal value.

Finally, Commerce's recharacterization of SWU transactions as sales of merchandise lacks any basis in the record and is unreasonable. Accordingly, even if this Court were to review Commerce's interpretation of section 1673 under step two of *Chevron*, it could not withstand scrutiny.

### A. The SWU Transactions Do Not Transfer Ownership of LEU.

#### 1. On Their Face, Eurodif's SWU Contracts Vest Title to Uranium Solely in the Utilities.

The United States contends that Eurodif's SWU contracts somehow vest enrichers with title to finished LEU during the period after production and prior to delivery. Gov't Br. 45-46; *cf.* USEC Br. 49-50. Neither the contracts themselves nor any other record evidence supports that conclusion. Gov't Pet. App. 46a.

Contrary to the United States' suggestion, Gov't Br. 45-46, the SWU contracts nowhere provide that title to LEU "passes" or "transfers" to utilities from any other entity. *See* C.J.A. 17, 87, 140, 188, 267. In a SWU transaction, a utility must independently acquire, and supply to an enricher, all of the feed needed for the LEU that the utility will receive.[15] Gov't Pet. App. 196a. Eurodif's SWU contracts expressly state that the utilities shall retain title to the uranium feed they provide for processing. C.J.A. 17, 87, 140, 188, 267. Title remains uninterrupted throughout the enrichment process. Accordingly, "[t]he feed uranium does not become an asset of the enricher, nor is it ever reflected as such on

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[15] Petitioners claim that enrichers may deliver LEU before receiving a feed delivery from the utility. Gov't Br. 47; USEC Br. 49. That did not occur here. *See* C.J.A. 607-08. Similarly, while petitioners claim that LEU is not identified at the time of importation as belonging to any particular customer, Gov't Br. 47; USEC Br. 50 n.13, all of Eurodif's imports were earmarked for specific customer deliveries, *see, e.g.*, C.J.A. 424.

the enricher's books and records," as Commerce verified. Gov't Pet. 185a & n.5; *see also* J.A. 119-20, 126-30. At the moment that the utility's feed is "deemed to have been enriched," the utility holds title to the "associated" LEU. C.J.A. 17, 87, 140, 188, 267.

The price term in Eurodif's SWU contracts underscores that only enrichment services are sold. Price is calculated on a per-SWU basis, and represents the total SWUs necessary to enrich the amount of feed the utility provides into the quantity of LEU it desires, at the product and tails assays that it specifies. C.J.A. 26, 97, 134, 199, 276. The contracts do not contain any price term covering uranium, and the total price charged reflects only the value of enrichment and related items.[16]

For all these reasons, as the Federal Circuit found, there is no "intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU." Gov't Pet. App. 20a; *see also id.* at 44a ("the contractual provisions . . . suggest an intention to establish a continuous chain of ownership in the utility"). Accordingly, the essential element of a sale—a transfer from the enricher to the utility of ownership in finished LEU—is missing from these SWU transactions.

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[16] The contracts provide that the price also includes such things as packaging, transport, and storage of feed. *Id.*

### 2. In Substance, Eurodif's SWU Contracts Provide for Sales of Enrichment Services.

Not only the literal terms of these SWU contracts, but also "the true nature of the transaction[s]," make clear that they are sales of enrichment services, not LEU. *Fla. Power*, 307 F.3d at 1374. The true "economic realities" of SWU transactions are determined by the parties' actual economic benefits and burdens. Pursuant to these contracts, utilities gain only enrichment services, and enrichers charge for only those services. The substance of SWU transactions is thus markedly different from EUP transactions, in which utilities gain finished LEU for a price that reflects the full value of that product. Moreover, in SWU transactions, utilities bear all of the risks associated with the purchase and ownership of uranium, further demonstrating that enrichers do not own the uranium and thus cannot sell it to utilities. *See generally infra* Point II.B.

Indeed, USEC itself has recognized elsewhere that SWU transactions are not sales of LEU. As it explained in comments submitted to Commerce in a different antidumping case involving uranium, "enriched uranium *per se* is generally not sold within the United States. Instead, utilities typically obtain nuclear fuel by purchasing natural uranium and conversion, enrichment and fabrication services separately." J.A. 137. And in its 2000 Annual Report, USEC observed that "[g]enerally, title to uranium provided by customers for enrichment purposes does not pass to USEC." J.A. 58. As the CIT observed, USEC also "has required its utility

customers to pay all property tax on what it views, correctly, as the 'customer's feed.'" Gov't Pet. App. 185a n.5.

Rather than confront the true substance of these contracts, petitioners focus primarily on two ancillary aspects of SWU transactions: first, that enrichment results in a "substantial transformation" of uranium, USEC Br. 39-43, and second, that uranium feed is, by nature, a fungible substance, Gov't Br. 48-50; USEC Br. 43-48. Neither feature can convert a SWU transaction into a sale of complete LEU.[17]

**Transformation of feed to LEU.** While enrichment concentrates the $U_{235}$ naturally occurring in uranium feed, it in no way follows that enrichers have sold finished LEU, as opposed to a processing service. Whether there has been substantial transformation of a raw material is relevant to whether (and where) a new good has been manufactured. *See Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556 (1908) (analyzing whether corks were manufactured in the U.S.); *Hartranft v. Weigmann*, 121 U.S. 609 (1887) (analyzing whether shells were manufactured in England). But substantial transformation has nothing to do with whether a good has been *sold*.

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[17] Petitioners also note that an enricher may use slightly more or less feed than a utility provided when enriching uranium—practices known as "overfeeding" or "underfeeding." *See* Gov't Br. 47; USEC Br. 45. These internal operations, however, have no bearing on what is sold. Even if an enricher were to overfeed or underfeed, the utility customer purchases, and pays for, the exact amount of SWUs needed to enrich the feed that it provides into the LEU that it desires. *Fla. Power*, 307 F.3d at 1373.

While USEC claims that substantial transformation allows Commerce to treat the sale of a processing service as a sale of merchandise, *see* USEC Br. 41, this view is inconsistent with Commerce's prior practices. In earlier cases involving substantial transformation of raw materials by a subcontractor, Commerce held that the subcontractor does not make a cognizable sale under the antidumping law. *See* Gov't Pet. App. 201a (citing *Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. 6,526, 6,527 (Dep't Commerce Feb. 9, 1998)) *Certain Pasta from Italy*, 63 Fed. Reg. 53,641, 53,642 (Dep't Commerce Oct. 6, 1998)). Where, as here, a subcontractor never acquires ownership over the raw materials used to make a finished product, and its pricing does not reflect the full value of that product, the antidumping law's sale-of-merchandise requirement is not satisfied merely because a subcontractor creates the product's "essential character."[18] *See* Gov't Pet. App. 201a-02a.

**Inherent fungibility of uranium feed.** Petitioners claim that the fungible nature of uranium feed somehow

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[18] USEC also argues that 19 U.S.C. § 2114b(5), which defines "services" as "economic activities whose outputs are other than tangible goods," suggests that SWU transactions must be treated as sales of merchandise. *See* USEC Br. 42. That definition is expressly confined to the "purposes of this section," *id.*, not to other trade laws. Moreover, USEC fails to acknowledge that section 2114b(5) expressly identifies "construction" and "engineering" as examples of services, demonstrating that, even under that provision, a service may result in the delivery of something tangible. Additionally, USEC's argument is inconsistent with the United States' position in negotiating the WTO General Agreement on Trade in Services ("GATS"). *See* J.A. 181-82, 190, 217.

makes enrichers the owners of LEU. *See* Gov't Br. 45-50; USEC Br. 43-48. It is undisputed that utilities own the uranium they furnish to enrichers in SWU transactions. For the uranium (in unenriched or enriched form) to become the property of enrichers, the utilities must relinquish ownership and enrichers must accept it. Neither condition is present here. Although the specific lot of LEU delivered to a utility "bears no necessary relationship to the unenriched uranium the utility furnished," Gov't Br. 48; *see also* USEC Br. 45, that fact does not effectuate a change in ownership. The enrichment process does not differentiate among particular lots of uranium feed simply because all have identical physical characteristics.

The bailment cases relied on by petitioners, Gov't Br. 48-49; USEC Br. 45-48, do not suggest otherwise; they address only who holds title to goods in the absence of any indication of the parties' intent. For example, *Powder Co. v. Burkhardt*, 97 U.S. 110 (1877), concerned whether the transfer to a manufacturer of fungible raw materials constituted a bailment where the parties' "agreement contain[ed] no reservation of title in the goods until they should be manufactured." *Id.* at 119. Lacking any clear manifestation of intent by the parties as to who owned the raw materials, the Court concluded that "the materials, when there was no stipulation to the contrary, should be taken to be" the manufacturer's.[19] *Id.*

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[19] *Burkhardt* also reflected an interest in protecting a third-party creditor who had seized the disputed property to satisfy a debt. 97 U.S. at 118-19. That concern is wholly absent here.

*Sturm v. Boker*, 150 U.S. 312 (1893), likewise leaves no doubt that the parties' intent as to ownership is controlling. There, one party had consigned goods with another, and the goods were damaged during shipment. *Id.* at 315. Addressing which party owned the goods and thus would bear the loss, the Court noted that "if, by the terms of the contract . . . the title to the goods vested in" one party, then he would be accountable for the loss. *Id.* at 322. In the absence of any explicit statement as to ownership, the Court held that the consignee was not the owner of the goods, since, *inter alia*, he was bound to return the identical items if he could not sell them. *Id.* at 329-30 (citing *Burkhardt*); *see also B.A. Ballou & Co. v. Citytrust*, 218 Conn. 749, 754 (Conn. 1991) (finding no bailment of scrap metal where a contract was silent as to ownership and distinguishing *General Motors Corporation v. Bristol*, 690 F.2d 26, 30-31 (2d Cir. 1982) on the ground that "the written agreement clearly stated that GM retained title to the scrap in the manufacturer's possession").

As these cases show, "in interpreting bailment contracts, an express agreement will prevail against general principles of law applicable in the absence of an express agreement, and it is improper to imply obligations except in the absence of express contractual terms." 8A AM. JUR. 2d Bailments § 29; *see also In re Bruening*, 113 F.3d 838, 840-41 (8th Cir. 1997) ("the parties' intent will determine how this business arrangement [either bailment or sale] ought to be characterized"); *Bristol*, 690 F.2d at 30 (Mansfield, J., concurring) ("When commingling is required by the needs of the trade and is done with the consent of the parties a bailment is established if that is the intent of

the parties."); *Diehr v. Thompson Chems. Corp.*, 281 S.W.2d 572, 577 (Mo. 1955) ("the contract between the parties, rather than the mere commingling, determines the nature of transactions [either bailment or sale] involving fungible goods").[20]

Eurodif's SWU contracts expressly set forth the parties' intent: that the utilities retain title and ownership to uranium throughout the enrichment process. C.J.A. 17, 87, 140, 188, 267.[21] Accordingly, the doctrine of bailment provides no basis for treating them as if they effectuated a sale.

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[20] The sole case cited by petitioners, *see* USEC Br. 47-48 n.12, suggesting that the parties' intent does not control whether a bailment arises, is contrary to settled authority and, in any event, the suggestion was mere dicta. In *Sitkin v. R-One Alloys, Inc.*, No. C.A. PB 04-0495, 2006 WL 625273 (R.I. Super. Ct. Mar. 16, 2006) (unpublished), the contract expressly provided that "customer shall have no further rights in respect to any material," *id.* at *5, just as the court found. While the court stated that its "decision does not rest primarily on the language of the [contract]," *id.* at *6, it never addressed the language in *Burkhardt* and *Sturm* establishing that the parties' intent is dispositive.

[21] To the extent the United States now suggests that the feed furnished by utilities is consideration for LEU, *see* Gov't Br. 48, it is incorrect. Commerce itself correctly recognized the infirmity of this position in its final determination. *See* Gov't Pet. App. 254a. Utilities provide their feed uranium to enrichers only so that it can be enriched into LEU. The feed is not a form of payment, but a raw material in need of processing. It is temporarily provided to enrichers, not for their benefit, but because they perform the necessary services.

### 3. The Courts, at the United States' Behest, Have Consistently Treated SWU Transactions as Sales of Services, Not Merchandise.

Petitioners' current position that section 1673 covers SWU transactions is especially hollow in light of their prior recognition that such transactions are sales of enrichment services, not LEU—a position the United States has successfully maintained in at least three prior cases. *See Fla. Power*, 307 F.3d at 1371-74; *Centerior Serv. Co. v. United States*, No. 95-103c, 1997 U.S. Claims LEXIS 323, at *19 (Fed. Cl. Dec. 29, 1997); *Barseback Kraft AB v. United States*, 36 Fed. Cl. 691, 705 (1996), *aff'd*, 121 F.3d 1475 (Fed. Cir. 1997).

In both *Barseback* and *Centerior*, the United States argued on behalf of USEC, which was then government-owned, that the Uniform Commercial Code does not apply to SWU contracts because no sale of goods is involved.[22] *See* J.A. 124-25. The court agreed in both

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[22] The United States' brief in *Barseback* tied this conclusion to the contractual pricing for SWU transactions:

> "[T]he price that [utilities] pay is . . . based solely on the number of SWUs needed to enrich natural uranium to the level they desire. There is no charge for the uranium itself. Thus, although customers receive enriched uranium from USEC, they have contracted only for the enrichment services associated with such uranium."

J.A. 125. The same is true of the pricing in Eurodif's SWU contracts.

instances. *See Barseback*, 36 Fed. Cl. at 705 ("It is clear . . . that the customers are contracting for services, not goods, from . . . USEC."); *Centerior*, 1997 U.S. Claims LEXIS 323, at *19 (holding the UCC inapplicable because SWU contracts "are for uranium enrichment services").

The United States successfully took the same position in *Florida Power*, 307 F.3d at 1364. There, the question was whether SWU contracts were covered by the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, which "does not apply to the provision of services." *Fla. Power*, 307 F.3d at 1371, 1373. The SWU contracts at issue there expressly provided that title to uranium feed transferred from the utilities to the enricher pending enrichment. Dismissing this title transfer as a "technicality," the United States argued, and the *Florida Power* court held, that SWU transactions are sales of the service of enrichment, not of goods.[23] 307 F.3d at 1373; Gov't Pet. App. 20a-21a. Eurodif's SWU contracts present an even easier case: they provide that the utilities retain title to their feed, rather than transferring it to the enricher. There can be no question that they are contracts for sales of services.

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[23] This Court, too, has characterized SWU transactions as ones for services, not goods. *See Huffman*, 486 U.S. at 665 ("Congress . . . authorize[d] the AEC to offer 'toll enrichment' services whereby utilities could obtain unenriched uranium on the open market and have it enriched by the AEC for a fee.").

### B. SWU and EUP Contracts Are Not Functionally Equivalent.

In claiming that to fulfill the purpose of the antidumping law it may be construed to reach SWU transactions, petitioners repeatedly suggest that SWU and EUP contracts are "functionally equivalent" and "essentially the same." USEC Br. 20; *see also* Gov't Br. 10-11; Gov't Pet. App. 255a. But aside from the fact that both types of transactions result in delivery of LEU, they are completely different contractual arrangements.

First, as explained above, SWU and EUP contracts differ with respect to which party owns the uranium that is enriched. *See supra* Point II.A. Most notably, EUP contracts provide for a "transfer" or "pass[age]" of title in the complete LEU product, C.J.A. 333, 392; in SWU contracts, utilities retain title to their feed during the enrichment process and until they have title to the associated LEU. *See* C.J.A. 17, 87, 140, 188, 267.

Second, SWU and EUP transactions entail markedly different commercial consequences and risks for utilities and enrichers. In EUP transactions, enrichers, not utilities, must acquire and incur the cost of the necessary uranium feed. *See* Gov't Pet. App. 204a. Accordingly, the price in EUP transactions is determined per kilogram of LEU, and covers all components of the LEU's value. *See id.* at 46a-47a, 204a-05a. By contrast, a utility must acquire uranium feed under a SWU contract, and the price term reflects only the value of enrichment. This distinction between the two types of contracts is especially significant given that uranium prices can swing dramatically over short

periods of time (*e.g.*, between 2003 and 2007, from $10/lb. to more than $130/lb.). *See* Ux Consulting, *Ux Current and Historical Price Indicators*, *at* http://www.uxc.com (last visited Sept. 14, 2008).[24]

SWU transactions and EUP transactions also offer utilities very different levels of control over LEU costs. In SWU transactions, utilities can manage the balance between feed and SWUs in order to minimize costs; they cannot do so in EUP transactions. More broadly, as the CIT recognized, SWU transactions allow utilities to manage and allocate the substantial risks involved in obtaining LEU by purchasing each step in the enrichment process separately and diversifying the sources for those steps. Gov't. Pet. App. 55a-56a.

Without such flexibility, utilities could face a disruption of their supply of nuclear fuel because of another party's failure to manage risk. For example, in the 1970s, following an 800% increase in the cost of uranium, Westinghouse Electric Corporation renounced its contracts to deliver finished fuel assemblies containing enriched uranium, claiming commercial impracticability. *See In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 994 (10th Cir. 1977). As a result, utilities determined that it would be better for them to assume, and therefore manage, the risks of nuclear fuel procurement by controlling each step in the process. J.A. 273.

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[24] This assumption of risk is further confirmation that, as a matter of economic substance, SWU and EUP transactions are not equivalent. *See Frank Lyon*, 435 U.S. at 576-80.

### C. Commerce's Methodology for Determining That LEU Was Dumped Confirms That the Antidumping Law Cannot Be Applied to Eurodif's SWU Transactions.

The methodology used by Commerce to determine that LEU had been sold at less than fair value in Eurodif's SWU transactions is contrary to the detailed directives set forth in the antidumping law. As Commerce acknowledged, a sale is cognizable under the antidumping law only if it reflects "100 percent of the value of the subject merchandise." Gov't Pet. App. 155a. While Commerce paid lip service to this statutory mandate, SWU prices indisputably do not reflect the full value of finished LEU. Thus, Commerce's calculations were a charade, underscoring that the antidumping law cannot be applied to these SWU contracts.

Commerce sought to "translate[ ]" Eurodif's enrichment prices and costs to a figure that would reflect the price of finished LEU "by adding a value for the uranium feedstock." J.A. 248. It "assign[ed] a specific monetary value to the natural uranium component," and added that amount both to Eurodif's price of enrichment services provided to U.S. utilities, and the constructed value of enrichment services in France. Gov't Pet. App. 257a. Since the values assigned to uranium were identical for both U.S. price and normal value, those values canceled out in the "fair value" comparison. In reality, Commerce compared only Eurodif's SWU prices and costs to determine that LEU itself had been dumped.

Commerce acknowledged that no statutory provision directly authorized this approach, but determined that the absence of such a provision did not prohibit it from acting. *See id.* at 155a, 233a. That conclusion was incorrect.[25]

Moreover, Commerce's methodology was inconsistent with explicit statutory language governing the calculation of U.S. price and normal value. In calculating the U.S. price of subject merchandise, Commerce must begin with "the *price* at which the *subject merchandise* is first *sold*." 19 U.S.C. § 1677a(a),(b) (emphasis added). The foreign side's normal value calculation similarly begins with "the price at which the foreign like product is first sold" or—where Commerce calculates a constructed value (due to the absence of available sales) as it did here—the seller's "cost of," *inter alia*, "materials . . . in producing the merchandise." *Id.* § 1677b(e)(1), (a)(1)(B)(i). Commerce then is directed to make certain adjustments to these figures, each of which is specifically enumerated in the statute. *Id.* §§ 1677a(c)-(d), 1677b(a)(6)-(8), (e).[26]

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[25] *See FAG Italia, S.p.A. v. United States*, 291 F.3d 806, 816 (Fed. Cir. 2002) ("the absence of an express statutory provision cannot be interpreted as giving an agency authority") (*citing S. Cal. Edison Co. v. Fed. Energy Regulatory Comm'n*, 195 F.3d 17 (D.C. Cir. 1999)).

[26] Authorized adjustments include, for example, increasing the U.S. price to reflect "the cost of all containers" used to prepare the merchandise for shipment, 19 U.S.C. § 1677a(c)(1)(A), and reducing the price to account for additional costs, charges and expenses, and U.S. duties, attributable to shipping the merchandise to the point of delivery in the United States. *Id.* § 1677a(c).

Commerce flouted these statutory requirements. It did not base its calculation of U.S. price on an actual price of LEU in SWU transactions, since Eurodif never charged such a price. Similarly, Commerce did not base its constructed value on Eurodif's actual costs of materials in producing LEU, since Eurodif bore no feed costs. And Commerce's addition to Eurodif's actual prices and costs of an assigned value for uranium is not among the adjustments authorized by the statute.

In short, while petitioners urge this Court to focus on economic realities, Commerce itself ignored economic reality in determining that LEU was sold at a dumped price in SWU transactions. The truth is that Eurodif did not sell or charge *any* price for LEU, discriminatory or otherwise. Commerce distorted Eurodif's actual pricing behavior—and disregarded clear statutory language governing the calculation of U.S. price and normal value—in order to impose the antidumping law on transactions it was never intended to cover.

### D. Commerce's Effort to Recharacterize Eurodif's SWU Transactions as "Merchandise . . . Sold" Is Wholly Unreasonable.

The antidumping law unambiguously precludes the imposition of dumping duties where, as here, no sale of merchandise has occurred. But even if the statutory language could somehow be deemed ambiguous, Commerce's application below could not survive the second step of a *Chevron* analysis because it is not "a reasonable policy choice for the agency to make." *Brand X*, 545 U.S. at 986 (internal quotation marks omitted).

Commerce's characterization of Eurodif's SWU transactions has no basis in the record and is thus unreasonable. Both the form and substance of the SWU contracts at issue here clearly reflect a sale of processing services alone, and effectuated no transfer of ownership in uranium feed or LEU. *See supra* Point II.A.

Petitioners' construction of the term "merchandise . . . sold" is also unreasonable because it severs the critical connection between *selling* merchandise and *setting the price* of that merchandise. Petitioners never argue, nor could they, that a sale of enrichment processing alone could trigger dumping duties. They claim, rather, that "it is in fact a complete LEU product that is 'sold' as a result of a SWU contract, and not only the enrichment component." Gov't Br. 48. It is undisputed, however, that in SWU transactions, Eurodif set a price for only enrichment services. It charged no price (and incurred no cost) for uranium; Commerce simply assigned an artificial value to account for that component. Because Eurodif set the price for only processing services, not for the full value of LEU, it had no opportunity to engage in price discrimination with respect to LEU.

Finally, Commerce has not justified its abrupt and *post hoc* withdrawal of its tolling regulation. Commerce has repeatedly recognized, in both its regulation and numerous decisions, that transactions between a toller and tollee are not sales of merchandise and thus are not cognizable under the antidumping law. Nowhere in Commerce's notice withdrawing the regulation or in the United States' brief to this Court is there any attempt to account for the crucial fact that led Commerce to

adopt the tolling regulation in the first place—that tollers are not price-setters, and thus not price-discriminators (or sellers), for subject merchandise. Accordingly, even if this Court were to find some ambiguity in section 1673, it should reject Commerce's interpretation of that provision under step two of *Chevron*.

## III. The Federal Circuit's Decision Has No Undesirable Policy Consequences.

### A. The Decision Below Does Not Permit Evasion of the Antidumping Law.

Contrary to petitioners' and amicus curiae CSUSTL's claims, affirming the judgment below would not permit circumvention of the antidumping law. *See* Gov't Br. 34-37; USEC Br. 23-24, 53-54; CSUSTL Br. 20-22. Petitioners argue that, under the Federal Circuit's holding, parties could theoretically structure a transaction as separate purchases of raw materials and manufacturing to avoid dumping duties. They do not suggest, nor could they, that SWU transactions were in fact structured for that purpose. As noted, SWU transactions were developed by the U.S. government pursuant to a statutory directive, and became standard practice in the enrichment industry long before any issue regarding the antidumping law arose. *See supra* at 7. Moreover, Commerce has means to address actual strategic circumvention of antidumping restrictions, *see* 19 U.S.C. § 1677; but Eurodif has not engaged in, and Commerce does not allege, any such conduct here.

In any event, the possibility that production could be segmented into separate transactions for raw materials and processing does not render the antidumping law inapplicable in circumstances where the merchandise is ultimately sold. Indeed, in Commerce's prior tolling cases, which involved a subcontractor's sale to a contractor (or tollee) of processing or inputs to raw materials, the agency found dumping based upon the tollee's downstream sale of the finished goods. *See, e.g., Certain Forged Stainless Steel Flanges from India*, 58 Fed. Reg. 68853 (Dep't Commerce Dec. 29, 1993); *Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. 6526 (Dep't Commerce Feb. 9, 1998) (prelim. admin. review); *Certain Pasta from Italy*, 63 Fed. Reg. 53641 (Dep't Commerce Oct. 6, 1998); *SRAMs Remand Determination in response to the Court of International Trade's remand in Taiwan Semiconductor v. US*, Slip Op. 00-48 (Jun. 2, 2000), *available at* http://ia.ita.doc.gov/remands/00-48.htm.

The United States now claims, however, that downstream sales by a tollee cannot "be used to calculate dumping margins" absent an "allegation that the foreign seller is affiliated with the U.S. purchaser." Gov't Br. 37. The United States is simply wrong. The earlier tolling cases involved unaffiliated tollers and tollees, and Commerce had no trouble relying on tollees' downstream sales to impose dumping duties there. *See, e.g., Certain Forged Stainless Steel Flanges from India*, 58 Fed. Reg. 68853 (Dep't Commerce Dec. 29, 1993); *Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. 6526 (Dep't Commerce Feb. 9, 1998); *Certain Pasta from Italy*, 63 Fed. Reg. 53641

(Dep't Commerce Oct. 6, 1998); *Taiwan Semiconductor, supra.* Indeed, in this very case, Commerce suggested that if the utilities (*i.e.*, the tollees) sold, rather than consumed, LEU, the antidumping law would reach those sales. *See* Gov't Pet. App. 124a.

Alternatively, if the United States' reference to downstream sales is intended to refer to tolled merchandise that is further transformed or manufactured in the United States, such a claim is equally wrong. The statute expressly provides a means for determining U.S. price in such circumstances. *See* 19 U.S.C. § 1677a(b),(d)(2).

### B. The Broader Ramifications of the Decision Below Favor Affirmance.

#### 1. Reversal Is Not Required to Protect U.S. Energy or National Security Interests.

According to petitioners, unless the Court reverses the decision below, Russia will have an "incentive to direct its enrichment capacity toward commercial enrichment . . . for the U.S. market, rather than downblending weapons-grade uranium." Gov't Br. 39; *see also* USEC Br. 18-19. USEC further contends that the threat of Russian LEU imports could undermine its plans to build a new enrichment plant, as well as the plans of another enricher to build a U.S. plant. USEC Br. 58.[27]

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[27] USEC no longer claims, as it did in its petition for certiorari, that affirming the court below "would . . . threaten the viability of [its] existing U.S. enrichment plant." USEC Pet. (Cont'd)

In the first place, these concerns have no bearing on the meaning of a statute enacted long before the process of nuclear fission was even discovered. Rather, they should be addressed, if at all, by Congress. *See, e.g.*, *Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2420 (2007) (whether a statute's supposed "undesirable consequences" warrant a change in law "is a policy debate that belongs in the halls of Congress, not in the hearing room of this Court"). And indeed, Congress is currently considering legislation that would address precisely these concerns by limiting Russian imports of LEU. *See* Energy and Water Appropriations Bill, 2009, S. 416, 110th Cong. § 2 (2008); Otto Kreisher, *Senate Panel Passes $488 Billion Defense Spending Bill*, CONGRESSDAILY, Sept. 10, 2008.

Moreover, petitioners' contentions about the potential ramifications of the decision below are unpersuasive on their merits. Even absent legislative action, the United States has ample authority to deal with Russian LEU imports without resorting to a distorted application of the antidumping law.

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(Cont'd)

App. 36. In any event, USEC is not, as it suggests, critical to the United States' ability to meet its nuclear defense needs. *See* USEC Br. 55. The U.S. Navy acquires fuel for nuclear-powered submarines not from USEC, but rather from downblending U.S. HEU stockpiles, which have been certified as sufficient to meet those needs for at least 40 years. *See* Daniel Horner, *Babcock & Wilcox to Acquire Downblending Competition*, NUCLEARFUEL, 2008 WLNR 17017489, Aug. 25, 2008, at 3; *see also* Secretary of Energy's Policy Statement on Management of Excess Uranium Inventory, at 1, *available* at http://www.ne.doe.gov.

*See* 50 U.S.C. § 1702(a)(1)(B) (authorizing President to "regulate, . . . prevent or prohibit, any . . . importation or exportation of . . . any property in which" a foreign national or country has an interest); 19 U.S.C. § 1862(c)(1)(A)(ii) (authorizing President to "adjust the imports of [an] article and its derivatives so that such imports will not threaten to impair the national security").[28]

In fact, the outcome that petitioners seek poses its own risks. USEC alone cannot satisfy U.S. demand for enrichment.[29] If petitioners prevailed here, foreign enrichers might reconsider their participation in the U.S. market, in which event Russian enriched uranium could become even more essential to utilities' nuclear needs.

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[28] As noted in Eurodif's opposition to the certiorari petitions, President Clinton previously utilized such authority to issue an executive order under one of these provisions to ensure "the full implementation of the [HEU] Agreement." Exec. Order No. 13,159, 65 Fed. Reg. 39,279 (June 21, 2000). That executive order has been renewed each year since. *See, e.g.*, Notice of President, 73 Fed. Reg. 35,335 (June 18, 2008).

[29] USEC's planned production for 2008 is approximately 6 million SWUs, USEC Inc., 2007 Annual Report (Form 10-K), at 6 (Feb. 26, 2008), *available at* http://216.139.227.101/interactive/usu2007/; whereas U.S. demand for 2008 is projected to be 14.5 million SWUs, Haruo Maeda, *The Global Nuclear Fuel Market Supply and Demand 2007-2030*, at 84, Table 3.5 (World Nuclear Ass'n 2006).

### 2. The Decision Below Avoids Conflict with the United States' International Obligations and Potential Retaliation Against U.S. Companies.

The United States' antidumping law is intended to implement Article VI of the General Agreement on Tariffs and Trade 1994 ("GATT"). *See* Uruguay Round Agreements Act of 1994 ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified at 19 U.S.C. §§3501 *et seq.*, plus scattered sections of 19 U.S.C.). Article VI of GATT permits dumping duties to be assessed only on sales of products, not on sales of services or processing alone.[30]

If this Court were to reverse the decision below, the ensuing imposition of dumping duties on the sale of enrichment processing would conflict with the United States' international obligations under Article VI. Such a conflict could have significant ramifications, including retaliation against U.S. exports. Moreover, should other nations adopt a similarly elastic interpretation of sales of merchandise, U.S. companies might face penalties in foreign markets.

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[30] *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 2.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Org., Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125, 1141 (1994).

### 3. The Decision Below Allows for Appropriate Competition in the U.S. Enrichment Services Market.

This Court should decline petitioners' invitation to expand the reach of the antidumping law in a manner that would further undermine competition—the cornerstone of our nation's antitrust laws—in the absence of any Congressional mandate to do so. *Cf. Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973) (rejecting an interpretation of the Federal Power Act that would "override the fundamental national policies embodied in the antitrust laws").

As this Court has repeatedly observed, price competition is the "central nervous system" of the free-enterprise system. *See, e.g., Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940)). Primarily for this reason, when competitors complain about pricing, the antitrust laws restrain price discrimination only when predatory pricing can be shown. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224-26 (1993); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 590-91 (1986). Absent predation, lower prices benefit consumers and there is no injury to competition under the antitrust laws. *See, e.g., Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, ___ U.S. __, 127 S.Ct. 1069, 1074 (2007); *Brooke Group*, 509 U.S. at 224-26.

Unlike the antitrust laws, the antidumping law requires no predation, predatory intent, threat to

competition, or actual anticompetitive effects to impose pricing controls that have the effect of raising import prices for U.S. consumers. *See* 19 U.S.C. § 1673. Thus, as this case illustrates, the antidumping law shields domestic industries from foreign price competition without regard to the competitive marketplace or to consumer welfare. As the Congressional Budget Office observed, the "U.S. antidumping law imposes added duties on imports . . . where price discrimination by the foreign exporter benefits the United States economically." CONGRESSIONAL BUDGET OFFICE, HOW THE GATT AFFECTS U.S. ANTIDUMPING AND COUNTERVAILING-DUTY POLICY 8 (1994).

Congress cabined the antidumping law to reach only sales of "foreign merchandise," 19 U.S.C. § 1673(1), and in all other respects, Congress has permitted competition with foreign industries to flourish. Were the Court to expand the application of the antidumping law to sweep in sales of processing services, as petitioners urge, those principles of competition would be undermined. Just as this Court has construed the Robinson-Patman Act's price-discrimination controls narrowly to do minimal violence to the antitrust laws and avoid causing unintended harm to consumers, *see Great Atlantic & Pacific Tea Co. v. Fed. Trade Comm'n*, 440 U.S. 69, 80 & n.13 (1979), the Court should construe the antidumping law consistent with its unambiguous terms to preserve the limits Congress placed on its intrusion on the free-enterprise system.

## CONCLUSION

For the foregoing reasons, this Court should affirm the Federal Circuit's judgment.

Respectfully submitted,

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# APPENDIX — STATUTORY PROVISIONS INVOLVED

19 U.S.C. § 1673 provides:

**Imposition of antidumping duties**

If—

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise. For purposes of this section and section 1673d(b)(1) of this title, a reference

to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of the merchandise.

19 U.S.C. § 1677a provides:

**Export price and constructed export price**

(a) Export price

The term "export price" means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c) of this section.

(b) Constructed export price

The term "constructed export price" means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d) of this section.

(c) Adjustments for export price and constructed export price

The price used to establish export price and constructed export price shall be—

(1) increased by—

(A) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States,

(B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States, and

(C) the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an export subsidy, and

(2) reduced by—

(A) except as provided in paragraph (1)(C), the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to

bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States, and

(B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 1677(6)(C) of this title.

(d) Additional adjustments to constructed export price

For purposes of this section, the price used to establish constructed export price shall also be reduced by—

(1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)—

(A) commissions for selling the subject merchandise in the United States;

(B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;

(C) any selling expenses that the seller pays on behalf of the purchaser; and

(D) any selling expenses not deducted under subparagraph (A), (B), or (C);

(2) the cost of any further manufacture or assembly (including additional material and labor), except in circumstances described in subsection (e) of this section; and

(3) the profit allocated to the expenses described in paragraphs (1) and (2).

(e) Special rule for merchandise with value added after importation

Where the subject merchandise is imported by a person affiliated with the exporter or producer, and the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise, the administering authority shall determine the constructed export price for such merchandise by using one of the following prices if there is a sufficient quantity of sales to provide a reasonable basis for comparison and the administering authority determines that the use of such sales is appropriate:

(1) The price of identical subject merchandise sold by the exporter or producer to an unaffiliated person.

(2) The price of other subject merchandise sold by the exporter or producer to an unaffiliated person.

If there is not a sufficient quantity of sales to provide a reasonable basis for comparison under paragraph (1) or (2), or the administering authority determines that neither of the prices described in such paragraphs is appropriate, then the constructed export price may be determined on any other reasonable basis.

(f) Special rule for determining profit

(1) In general

For purposes of subsection (d)(3) of this section, profit shall be an amount determined by multiplying the total actual profit by the applicable percentage.

(2) Definitions

For purposes of this subsection:

(A) Applicable percentage

The term "applicable percentage" means the percentage determined by dividing the total United States expenses by the total expenses

(B) Total United States expenses

The term "total United States expenses" means the total expenses described in subsection (d)(1) and (2) of this section.

(C) Total expenses

The term "total expenses" means all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise:

(i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price.

(ii) The expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise.

(iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.

(D) Total actual profit

The term "total actual profit" means the total profit earned by the foreign producer, exporter, and affiliated parties described in subparagraph (C) with respect to the sale of the same merchandise for which total expenses are determined under such subparagraph.

19 U.S.C. § 1677b provides:

**Normal value**

(a) Determination

In determining under this subtitle whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value. In order to achieve a fair comparison with the export price or constructed export price, normal value shall be determined as follows:

*Appendix*

(1) Determination of normal value

(A) In general

The normal value of the subject merchandise shall be the price described in subparagraph (B), at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price under section 1677a(a) or (b) of this title.

(B) Price

The price referred to in subparagraph (A) is—

(i) the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price, or

(ii) in a case to which subparagraph (C) applies, the price at which the foreign like product is so sold (or offered for sale) for consumption in a country other than the exporting country or the United States, if—

(I) such price is representative,

(II) the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in such other country is 5 percent or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export to the United States, and

(III) the administering authority does not determine that the particular market situation in such other country prevents a proper comparison with the export price or constructed export price.

(C) Third country sales

This subparagraph applies when—

(i) the foreign like product is not sold (or offered for sale) for consumption in the exporting country as described in subparagraph (B)(i),

(ii) the administering authority determines that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold in the

exporting country is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States, or

(iii) the particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price.

For purposes of clause (ii), the aggregate quantity (or value) of the foreign like product sold in the exporting country shall normally be considered to be insufficient if such quantity (or value) is less than 5 percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States.

(2) Fictitious markets

No pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account in determining normal value. The occurrence of different movements in the prices at which different forms of the foreign like product are sold (or, in the absence of sales, offered for sale) in the exporting country after the issuance of an antidumping duty order may be considered by the administering authority as evidence of the establishment of a fictitious market for the foreign like product if the movement in such prices appears to reduce the

amount by which the normal value exceeds the export price (or the constructed export price) of the subject merchandise.

(3) Exportation from an intermediate country

Where the subject merchandise is exported to the United States from an intermediate country, normal value shall be determined in the intermediate country, except that normal value may be determined in the country of origin of the subject merchandise if—

(A) the producer knew at the time of the sale that the subject merchandise was destined for exportation;

(B) the subject merchandise is merely transshipped through the intermediate country;

(C) sales of the foreign like product in the intermediate country do not satisfy the conditions of paragraph (1)(C); or

(D) the foreign like product is not produced in the intermediate country.

(4) Use of constructed value

If the administering authority determines that the normal value of the subject merchandise cannot be determined under paragraph (1)(B)(i), then, notwithstanding paragraph (1)(B)(ii), the normal value of the subject merchandise may be the constructed value of that merchandise, as determined under subsection (e) of this section.

(5) Indirect sales or offers for sale

If the foreign like product is sold or, in the absence of sales, offered for sale through an affiliated party, the prices at which the foreign like product is sold (or offered for sale) by such affiliated party may be used in determining normal value.

(6) Adjustments

The price described in paragraph (1)(B) shall be—

(A) increased by the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States;

(B) reduced by—

(i) when included in the price described in paragraph (1)(B), the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the foreign like product in condition packed ready for shipment to the place of delivery to the purchaser,

(ii) the amount, if any, included in the price described in paragraph (1)(B), attributable to any additional costs, charges, and expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser, and

(iii) the amount of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise, but only to the extent that such taxes are added to or included in the price of the foreign like product, and

(C) increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to—

(i) the fact that the quantities in which the subject merchandise is sold or agreed to be sold to the United States are greater than or less than the quantities in which the foreign like product is sold, agreed to be sold, or offered for sale,

(ii) the fact that merchandise described in subparagraph (B) or (C) of section 1677(16) of this title is used in determining normal value, or

(iii) other differences in the circumstances of sale.

(7) Additional adjustments

(A) Level of trade

The price described in paragraph (1)(B) shall also be increased or decreased to make due allowance for any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise made under this section) that is shown to be wholly or partly due to a difference in level of trade between the export price or constructed export price and normal value, if the difference in level of trade—

(i) involves the performance of different selling activities; and

(ii) is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined.

In a case described in the preceding sentence, the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which normal value is determined.

(B) Constructed export price offset

When normal value is established at a level of trade which constitutes a more advanced stage of distribution than the level of trade of the constructed export price, but the data available do not provide an appropriate basis to determine under subparagraph (A)(ii) a level of trade adjustment, normal value shall be reduced by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 1677a(d)(1)(D) of this title.

(8) Adjustments to constructed value

Constructed value as determined under subsection (e) of this section, may be adjusted, as appropriate, pursuant to this subsection.

(b) Sales at less than cost of production

(1) Determination; sales disregarded

Whenever the administering authority has reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of that product, the administering authority shall determine whether, in fact, such sales were made at less than the cost of production. If the administering authority determines that sales made at less than the cost of production—

(A) have been made within an extended period of time in substantial quantities, and

(B) were not at prices which permit recovery of all costs within a reasonable period of time,

such sales may be disregarded in the determination of normal value. Whenever such sales are disregarded, normal value shall be based on the remaining sales of the foreign like product in the ordinary course of trade. If no sales made in the ordinary course of trade remain, the normal value shall be based on the constructed value of the merchandise.

(2) Definitions and special rules

For purposes of this subsection—

(A) Reasonable grounds to believe or suspect

There are reasonable grounds to believe or suspect that sales of the foreign like product were made at prices that are less than the cost of production of the product, if—

(i) in an investigation initiated under section 1673a of this title or a review conducted under section 1675 of this title, an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 1677(9) of this title provides information, based upon observed prices or constructed prices or costs, that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of the product; or

(ii) in a review conducted under section 1675 of this title involving a specific exporter, the administering authority disregarded some or all of the exporter's sales pursuant to paragraph (1) in the investigation or if a review has been completed, in the most recently completed review.

(B) Extended period of time

The term "extended period of time" means a period that is normally 1 year, but not less than 6 months.

(C) Substantial quantities

Sales made at prices below the cost of production have been made in substantial quantities if—

(i) the volume of such sales represents 20 percent or more of the volume of sales under consideration for the determination of normal value, or

(ii) the weighted average per unit price of the sales under consideration for the determination of normal value is less than the weighted average per unit cost of production for such sales.

(D) Recovery of costs

If prices which are below the per unit cost of production at the time of sale are above the weighted average per unit cost of production for the period of investigation or review, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

*Appendix*

(3) Calculation of cost of production

For purposes of this part, the cost of production shall be an amount equal to the sum of—

(A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business;

(B) an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question; and

(C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment.

For purposes of subparagraph (A), if the normal value is based on the price of the foreign like product sold for consumption in a country other than the exporting country, the cost of materials shall be determined without regard to any internal tax in the exporting country imposed on such materials or their disposition which are remitted or refunded upon exportation.

(c) Nonmarket economy countries

(1) In general

If—

(A) the subject merchandise is exported from a nonmarket economy country, and

(B) the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a) of this section,

the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. Except as provided in paragraph (2), the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.

(2) Exception

If the administering authority finds that the available information is inadequate for purposes of determining the normal value of subject merchandise under paragraph (1), the

administering authority shall determine the normal value on the basis of the price at which merchandise that is—

(A) comparable to the subject merchandise, and

(B) produced in one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country, is sold in other countries, including the United States.

(3) Factors of production

For purposes of paragraph (1), the factors of production utilized in producing merchandise include, but are not limited to—

(A) hours of labor required,

(B) quantities of raw materials employed,

(C) amounts of energy and other utilities consumed, and

(D) representative capital cost, including depreciation.

(4) Valuation of factors of production

The administering authority, in valuing factors of production under paragraph (1), shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—

(A) at a level of economic development comparable to that of the nonmarket economy country, and

(B) significant producers of comparable merchandise.

(d) Special rule for certain multinational corporations

Whenever, in the course of an investigation under this subtitle, the administering authority determines that—

(1) subject merchandise exported to the United States is being produced in facilities which are owned or controlled, directly or indirectly, by a person, firm, or corporation which also owns or controls, directly or indirectly, other facilities for the production of the foreign like product which are located in another country or countries,

(2) subsection (a)(1)(C) of this section applies, and

(3) the normal value of the foreign like product produced in one or more of the facilities outside the exporting country is higher than the normal value of the foreign like product produced in the facilities located in the exporting country,

it shall determine the normal value of the subject merchandise by reference to the normal value at which the foreign like product is sold in substantial quantities from one or more facilities outside the exporting country. The administering authority, in making any determination under this paragraph, shall make adjustments for the difference between the cost of production (including taxes, labor, materials, and overhead) of the foreign like product produced in facilities outside the exporting country and costs of production of the foreign like product produced in facilities in the exporting country, if such differences are demonstrated to its satisfaction. For purposes of this subsection, in determining the normal value of the foreign like product produced in a country outside of the exporting country, the administering authority shall determine its price at the time of exportation from the exporting country and shall make any adjustments required by subsection (a) of this section for the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States by reference to such costs in the exporting country.

(e) Constructed value

For purposes of this subtitle, the constructed value of imported merchandise shall be an amount equal to the sum of—

(1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of business;

(2)(A) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or

(B) if actual data are not available with respect to the amounts described in subparagraph (A), then—

(i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for

consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,

(ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or

(iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise; and

(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the subject merchandise

in condition packed ready for shipment to the United States.

For purposes of paragraph (1), the cost of materials shall be determined without regard to any internal tax in the exporting country imposed on such materials or their disposition which are remitted or refunded upon exportation of the subject merchandise produced from such materials.

(f) Special rules for calculation of cost of production and for calculation of constructed value

For purposes of subsections (b) and (e) of this section.—

(1) Costs

(A) In general

Costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise. The administering authority shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer on a timely basis, if such allocations have

been historically used by the exporter or producer, in particular for establishing appropriate amortization and depreciation periods, and allowances for capital expenditures and other development costs.

(B) Nonrecurring costs

Costs shall be adjusted appropriately for those nonrecurring costs that benefit current or future production, or both.

(C) Startup costs

(i) In general

Costs shall be adjusted appropriately for circumstances in which costs incurred during the time period covered by the investigation or review are affected by startup operations.

(ii) Startup operations

Adjustments shall be made for startup operations only where—

(I) a producer is using new production facilities or producing a new product that requires substantial additional investment, and

(II) production levels are limited by technical factors associated with the initial phase of commercial production.

For purposes of subclause (II), the initial phase of commercial production ends at the end of the startup period. In determining whether commercial production levels have been achieved, the administering authority shall consider factors unrelated to startup operations that might affect the volume of production processed, such as demand, seasonality, or business cycles.

(iii) Adjustment for startup operations

The adjustment for startup operations shall be made by substituting the unit production costs incurred with respect to the merchandise at the end of the startup period for the unit production costs incurred during the startup period. If the startup period extends beyond the period of the investigation or review under this subtitle, the administering authority shall use the most recent cost of production data that it reasonably can obtain, analyze, and verify without delaying the timely completion of the investigation or review. For purposes of this subparagraph, the startup period ends at the point at which the level of commercial production that is characteristic of the merchandise, producer, or industry concerned is achieved.

(2) Transactions disregarded

A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.

(3) Major input rule

If, in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph (2).

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Nos. 07-1059 & 07-1078

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IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,
v.
EURODIF S.A., *ET AL.*, *Respondents*.

USEC INC. AND UNITED STATES ENRICHMENT CORPORATION, *Petitioners*,
v.
EURODIF S.A., *ET AL.*, *Respondents*.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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## RULE 29.6 STATEMENT

The corporate disclosure statement contained in USEC's Petition for Writ of Certiorari, Pet. ii, remains accurate.

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Nos. 07-1059 & 07-1078

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,
v.
EURODIF S.A., *ET AL.*, *Respondents*.

USEC INC. AND UNITED STATES ENRICHMENT CORPORATION, *Petitioners*,
v.
EURODIF S.A., *ET AL.*, *Respondents*.

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

## REPLY BRIEF FOR PETITIONERS USEC INC. AND UNITED STATES ENRICHMENT CORPORATION

In their briefs, respondents work at length to establish a point that we do not contest: that it is possible to view SWU transactions as sales of a service, as opposed to sales of the produced merchandise, low enriched uranium (LEU). But that point does not make respondents' case. Under the principles set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it is not enough for

respondents to show that the Commerce Department *could* view such transactions as sales of a service; rather they have to establish that the agency *must* view them that way, *i.e.*, that Commerce's treatment of SWU transactions as sales of merchandise is foreclosed by the statutory language or otherwise outside the bounds of reasonableness. *See Barnhart v. Walton*, 535 U.S. 212, 218 (2002). Judged by that exacting standard, respondents' case falls well short.

To begin with, it is telling that respondents do not refute any of the critical factors relied upon by Commerce to conclude that the enricher's delivery of LEU under SWU contracts can, and should, be considered a sale of LEU. Despite their invocation of "deeming" clauses and legal "fictions" in the SWU contracts, respondents necessarily acknowledge that the LEU delivered to a customer by an enricher is not made from the specific batch of raw material provided by that customer, but is made from a fungible inventory of unenriched uranium. Respondents also concede that the enricher transforms that fungible material into an entirely new article of commerce—LEU. And respondents accept that, regardless of how much unenriched uranium the customer provides, the enricher may produce LEU using as much unenriched uranium as it deems desirable, and may deliver *any* LEU that it produces to *any* customer. Based upon these undisputed facts, Commerce determined that, for purposes of the antidumping law, the enricher can reasonably be regarded as having ownership of the LEU that it produces and, consequently, that the transfer of a particular quantity of LEU to a utility pursuant to the agreed-upon terms amounts to a sale of the LEU.

Respondents insist, however, that the Commerce Department cannot decide that the enricher owns the LEU it produces and delivers in light of two provisions of the SWU contracts, which say that the utility retains title to the unenriched uranium it provides to the enricher and that the LEU delivered by the enricher to the utility is "deemed" to be made from that unenriched uranium. Relying on those contract provisions, they contend that the utility continuously owns both the unenriched uranium after it is delivered to the enricher and the LEU that is ultimately delivered by the enricher. But, even leaving aside that "title" and "ownership" are not necessarily the same thing, there are several flaws in their argument. First of all, as a factual matter, the supposed continuous chain of ownership by the utility simply does not exist: the LEU that the utility ultimately receives is not produced from the batch of uranium delivered by the utility. Moreover, as a legal matter, respondents do not cite any authority—none at all—for the proposition that a federal agency, in applying federal law to a particular transaction, is obligated to accept all of the provisions of the parties' contracts, particularly those that are at odds with the reality of the transaction. This Court has said just the opposite. *See, e.g.*, *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("form should be disregarded for substance and the emphasis should be on economic reality").

Respondents also argue that SWU transactions cannot be regarded as sales of merchandise because Commerce, in calculating the dumping margin in this case, valued only the SWU component of LEU. But respondents' characterization of what Commerce did erroneously mixes together what Commerce valued with

how Commerce valued it. As even respondents acknowledge, when Commerce compared U.S. prices and constructed value, the agency did not value just the enrichment component alone, but rather calculated values for LEU as a whole, using Eurodif's actual uranium sales prices as the basis for valuing the uranium component. Respondents' real complaint is thus about the methodology of that comparison—in particular, that Commerce used the same figure for the uranium component in arriving at the U.S. price and the constructed value—an objection that goes to a calculation issue not before the Court. And, in any event, it is well recognized that, where dumping margin determinations are concerned, the Department's methodologies are entitled to great deference. *See Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1380-81 (Fed. Cir. 2001).

Finally, respondents rely heavily on various decisions, including some by Commerce, that have treated certain transactions in which customers supply raw materials to foreign manufacturers as involving sales of services by the manufacturers. But those decisions at most demonstrate only that such transactions can be viewed as sales of services, not that they must be. Indeed, the most pertinent court of appeals' decision, *Florida Power & Light Co. v. United States*, 307 F.3d 1364, 1373 (Fed. Cir. 2002), makes clear that SWU transactions "do[ ] not fall neatly" into either category (sales of services or sales of goods), a conclusion that highlights just the sort of ambiguity that a federal agency is entitled to resolve when interpreting and applying a statute it administers. As for decisions by Commerce itself, Commerce has explained that, to the

extent that those cases suggest that it did not regard so-called tolling transactions as sales of subject merchandise, any such suggestion was an inadvertent by-product of the agency's focus on a very different determination—that subsequent sales by the customer should be used for purposes of calculating antidumping margins. This Court has recognized that an agency is not bound by its prior views on an issue, *see, e.g.*, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981-82 (2005), provided that it gives a reasonable explanation for any change, and Commerce has explained why it did not fully appreciate the possible implications of its earlier view in other contexts and why its current view is based on a reasonable assessment of the actual nature of LEU transactions. As a result, its interpretation merits *Chevron* deference.

## I. THE ANTIDUMPING LAW HAS NOT UNAMBIGUOUSLY FORECLOSED THE COMMERCE DEPARTMENT'S INTERPRETATION IN THIS CASE.

Under *Chevron*, the first question is whether "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 843. If it has not, then any reasonable agency application of the statute must be upheld. Here, the "precise question" is whether transactions with the pertinent characteristics of SWU transactions can be regarded as sales of merchandise under the antidumping law. The Commerce Department concluded that SWU transactions could be viewed that way because, among other things, the enricher makes an entirely new product from fungible inventories of raw material, has full operational control over the making

of the new product, and can deliver any LEU it produces to anyone that it chooses. USEC Pet. 217a-221a. Given that degree of control over the ultimate product that is imported into the United States, Commerce determined that the enricher effectively owns the LEU until it delivers it to a particular utility customer and, thus, sells the product when it transfers ownership to that utility for consideration. *Id.* 222a.

Respondents contend that Congress has unambiguously foreclosed that interpretation, basing their argument on the position that the term "sale" (or, more specifically, "sold") requires a "transfer of ownership" for consideration. Eurodif Br. 17; AHUG Br. 19. But this argument, taken at face value, is close to a *non sequitur*. In its Final Remand Determination, the Department not only explicitly quoted that same definition of a "sale," USEC Pet. 220a, but then went on to find a sale here precisely *because* it determined that there was a transfer of ownership in LEU for consideration. *Id.* Thus, a transfer-of-ownership requirement, by itself, cannot possibly be the basis for rejecting the Department's decision under the first step of *Chevron*.

To have any possible force, therefore, respondents' statutory argument would have to be at one stage removed: that the word "ownership"—read into the statute by implication—has an unambiguous meaning that bars Commerce from treating enrichers as owners of the LEU they transfer. But, on that more specific point, respondents face serious obstacles. To begin with, they offer no definition of "ownership" at all, let alone an unmistakably clear one. Furthermore, it is hard to

imagine that any universally-applied definition of "ownership" could be found. As Justice Breyer has observed: "[T]he words 'own' and 'ownership' . . . are not technical terms of art but common terms, the precise legal meaning of which depends upon the statutory context in which they appear." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 481 (2003) (Breyer, J., concurring in part and dissenting in part).[1] Similarly, the Second Circuit has stated, referring to the definition of "owner" in an earlier edition of *Black's Law Dictionary*, that "[t]his definition's ambiguity comes as no surprise. Long-standing scholarship has informed us that ownership—and its attendant concept 'property'—has limited inherent content." *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 327 (2d Cir. 2000) (*citing Black's Law Dictionary* 1130 (7th ed. 1999)).

Reflecting that lack of concreteness, dictionary definitions of owner and ownership have tended to vary over time and according to circumstances. The most recent edition of *Black's Law Dictionary*, however, defines the term "owner" in largely functional terms as "[o]ne who has the right to possess, use, and convey something; a person in whom one or more interests are vested." *Black's Law Dictionary* 1137 (8th ed. 2004). Indeed, in this current definition, the authors have attempted to eliminate at least part of the "ambiguity" noted by the Second Circuit in *Commander Oil*, choosing to delete the previous alternative definition of

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[1] In *Dole Food*, the Court looked at the statutory context and held that Congress, in using the term "ownership" in the Foreign Sovereign Immunities Act of 1976, had intended for it to be interpreted in light of corporate law principles, rather than "in the colloquial sense of that term." 538 U.S. at 474.

an owner as "[o]ne who has the primary or residuary title to property. . . ." *See Black's Law Dictionary* 1130 (7th ed. 1999). As a result, any determination of who has "ownership" of particular property—at least when title and possession lie in different persons—requires a fact-based inquiry into the parties' respective rights to use and control the property. *See, e.g., United States v. Peterson Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1358-59 (N.D. Ill. 1992) (concluding that a trustee holding legal and beneficial title, but not having management and control of the property, was merely a "paper owner" and, for purposes of CERCLA liability, did not hold "ownership under the[] pragmatic federal standards" recognized by this Court in *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978)). There is no reason to think that Congress, merely by using the word "sold," meant to preclude Commerce from undertaking that more "pragmatic" examination of ownership in cases subject to the antidumping law.

That possibility becomes even more improbable if one considers the 1984 amendment to the antidumping law. *See* USEC Br. 32-33, 52. In that amendment, Congress provided that "a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise that is *equivalent to* the sale of the merchandise." 19 U.S.C. § 1673 (2000) (emphasis added). The Committee Report explained the reason for the amendment by noting that "leasing arrangements are often utilized to accomplish what are in effect transfers of ownership." H.R. Rep. No. 98-725, at 11 (1984). Taking the language of the statute and the Committee Report together, therefore, it seems apparent that Congress did not intend the

concepts of "sale" or "transfer of ownership" to have the narrowest possible meaning. And, while it is certainly correct that the amendment, by its terms, applies only to leases, the underlying principle reflected in the amendment—that the parties' contractual arrangements do not necessarily control whether a transfer of ownership has taken place—is relevant to other kinds of complex transactions under the antidumping law.

It is thus evident that Congress has not forbidden the agency determination here, even if the controlling definition of "sale" is a transfer of ownership for consideration. That said, we have previously cited to several cases from this Court that take a broader view of the term "sale," one of which expressly noted that "[a] regulatory statute . . . would be hamstrung if it were tied down to technical concepts of local law." *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400 (1965). *See* USEC Br. 23, 31. While respondents try to distinguish these cases, they do so primarily by asserting that the facts show "an effective transfer of ownership" (Eurodif Br. 24) or "a transfer of some ownership rights" (AHUG Br. 28). Those purported explanations may simply confirm that the concept of "ownership" is itself open to ambiguity—the point that we have just made—but they also tend to suggest that the term "sale" leaves room for agency interpretation in light of the statutory purposes. Either way, however, Congress has not conclusively spoken to the precise question here, thus delegating to Commerce the authority to provide a reasonable interpretation and application of the term.

## II. COMMERCE REASONABLY CONCLUDED THAT SWU TRANSACTIONS INVOLVE A TRANSFER OF OWNERSHIP OF LEU FOR CONSIDERATION.

### A. Commerce Reasonably Found That Enrichers Transfer Ownership Of The LEU.

1. The second question under *Chevron* is whether the agency's interpretation of the statute is reasonable. *See United States v. Mead*, 533 U.S. 218, 229 (2001). With respect to this question, respondents make no headway in challenging the factors on which Commerce relied for its determination that SWU transactions involve transfers of ownership and, thus, sales of merchandise. For example, they do not dispute that an enricher, by substantially transforming raw material into LEU, creates—and then transfers—a new article of merchandise. But that concession necessarily undermines respondents' characterization, pressed throughout their briefs, that the enricher is merely processing and returning the same good that the utility originally provided.

Respondents likewise cannot directly contest the fact that the enricher does not make LEU for a particular utility from the specific raw material provided by that utility. Although respondents repeatedly refer to the LEU delivered to a particular customer as though it were in fact produced from "the" uranium delivered and owned by the customer,[2] they ultimately are forced

[2] *See, e.g.*, Eurodif Br. 9 ("the utilities will retain title to *the* uranium feed throughout the enrichment process"); *id.* 19 ("utilities provide Eurodif with *the* feed they want enriched. . . ."); AHUG Br. 6 ("Next, the utility separately contacts with an (Cont'd)

to explain that this assertion rests on a contractual provision "deeming" that to be the fact. *See* Eurodif Br. 37, citing C.J.A. 17, 87, 140, 188, 268 ("deeming" provisions of SWU contracts); AHUG Br. 22 (same). But, for present purposes, the difference between the contract and the real world is significant. That "deeming" provision (and other provisions of the contract) may well control the rights of the contracting parties *vis a vis* each other, *see* USEC Br. 53, but it is hardly unreasonable for Commerce, in determining whether the antidumping law applies, to give greater weight to what actually happens than to what the parties "deem" to happen in agreements between themselves. *See infra* pp. 13-15.

That is precisely what Commerce did here. As the agency pointed out, the actual production and delivery of LEU bears little resemblance to the fiction embedded in the SWU contracts between Eurodif and its utility customers. USEC Pet. 219a. Rather, in producing LEU, Eurodif gasifies unenriched uranium from its fungible inventory of unenriched uranium, which includes uranium that it unquestionably owns (USEC Pet. 221a), and continuously recycles that gas to make LEU—any of which can be delivered to any customer. (LEU at any particular product assay is itself fungible.) Thus, as Commerce found, the utility has no right of ownership in the LEU until delivery, and the enricher has "the

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(Cont'd)

enrichment service provider to enrich *the* $UF_6$"); AHUG Br. 7 ("The utility retains ownership of *the* uranium in all of its chemical forms throughout these stages of nuclear fuel production . . . .") (emphasis supplied in all quotations).

right to sell the LEU at issue to any buyer" until that time. *Id.* 219a. Furthermore, Eurodif, like any enricher, produces that LEU using whatever proportions of raw material and power it deems most advantageous. It has no obligation to use the identical amount of raw material provided by a utility pursuant to any specific purchase order, and, indeed, the enricher almost invariably "overfeeds" (uses more uranium) or "underfeeds" (uses less uranium) in order to produce LEU at the least possible cost. *See* USEC Br. 9-11; USEC Pet. 229a-230a.[3]

It is thus clear that an enricher exercises total control over the production and disposition of all LEU that it produces. Certainly, a utility, in submitting its purchase orders, has a range of choices about how much cash and unenriched uranium it will provide. USEC Pet. 229a. But all that means is that the utility has some control over the terms of the *transaction*, not that it has any control over the *production* of LEU. And while respondents point out that the utilities decide how much LEU to order and what the $U_{235}$ concentration (assay) of that LEU should be, the fact that the customer can make that kind of choice—which is no different from the choice any purchaser of goods can make—hardly shows that the enricher lacks ownership of the LEU that it produces. Notably, the utilities make the same decisions about amount and concentration of LEU in

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[3] Indeed, as we have previously noted, USEC Br. 49, and respondents do not dispute, the enricher may pre-produce LEU that is ultimately delivered to a customer even before the customer provides any unenriched uranium. Or an enricher may fulfill its obligations under a SWU contract, without making any LEU at all, by arranging for the delivery of LEU produced by another enricher. *Id.* 10-11.

cash-only (EUP) transactions, and respondents concede that those transactions involve a sale of merchandise by the enricher. *See* USEC Br. 8-9 (describing SWU and EUP transactions).

Taking all these factors together, it was entirely reasonable for the Department to decide what it did: that, prior to the customer's obtaining delivery of the LEU it ordered, the enricher has sufficient rights in, and control over, the LEU it produces to be regarded as the owner of that LEU. It is true, of course, that the enricher would be subject to a breach of contract claim if it failed to deliver the requisite amount of LEU to the utility, but that potential liability is not inconsistent with the determination that the enricher owns the LEU it produces. The fact that a customer has a contractual right to the future delivery of a specified amount of goods is very different from having ownership of those goods before they are delivered.

2. Respondents' principal argument is that the factors relied upon by Commerce cannot demonstrate the enricher's ownership of LEU because SWU contracts provide that the utility retains "title" to the unenriched uranium it supplies to the enricher and that the delivered LEU is "deemed" to have been produced from that uranium. Taken together, those two provisions lie at the heart of respondent's position that the utility owns the LEU before it is delivered. But this argument depends upon a false factual premise. While the utility may continue to hold title to a designated amount of unenriched uranium, it cannot claim (other than by resort to deeming) that it has title to, or ownership of, the *actual* feedstock used to make the LEU that it ultimately receives.

Respondents plainly believe that the Commerce Department must accept what the parties have deemed as fact, but they offer no authority at all to support that implausible proposition. Not surprisingly, the law is firmly to the contrary. This Court has frequently held that administrative agencies, in applying federal regulatory statutes to particular transactions, are not constrained by the parties' contractual arrangements. *See, e.g., California Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965) ("Were [the parties] free to allocate by contract gas from a particular source to a particular use, havoc would be raised with the federal regulatory scheme. . . ."); *Tcherepnin v. Knight*, 389 U.S. 332; *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946); *Corliss v. Bowers*, 281 U.S. 376 (1930). And, despite respondents' attempts to suggest otherwise, that is so regardless of whether those arrangements reflect an intent to evade the particular federal law. *See United Gas Improvement*, 381 U.S. at 400 (court looks beyond structure of transactions "[w]ithout impugning in any way the good faith and genuineness" of those transactions).

The Department thus was not required to accept, contrary to fact, that the LEU delivered to a utility is produced from its own feedstock. But, once the fiction of "deeming" is set aside, the other contractual provision relied on by respondents—the title retention provision—essentially becomes irrelevant to the issue here. A utility cannot credibly claim ownership of any particular LEU upon production (and before delivery) merely because it has retained "title" to an undifferentiated quantity of feedstock in the enricher's

inventory.[4] Indeed, even if one were to indulge the assumption that the LEU delivered to a utility *is* made from its feedstock, it would hardly be self-evident that the utility automatically owned that LEU—a different article of merchandise—prior to delivery. A number of the SWU contracts, in fact, suggest just the opposite, specifically providing that the enricher must transfer title to the LEU, and give warranties regarding that title, to the utility, *see, e.g.*, C.J.A. 23, 147, an obligation that necessarily implies that the enricher has ownership in the first place.

### B. Respondents' Arguments About Price And Valuation Are Incorrect.

Respondents make two loosely connected arguments about the "price" of LEU, apparently to demonstrate that SWU transactions cannot be treated as sales of merchandise. To start with, they argue that the contracts between Eurodif and its customers reflect only a sale of services because "[t]he contracts do not contain any price term covering uranium. . . ." Eurodif Br. 37. But, under any natural meaning of the words "price term," that is not the case. The SWU contracts (taken together with the relevant purchase orders) provide that, to obtain LEU, a customer must provide *both* a stated amount of cash *and* a specified amount of unenriched uranium for the enricher's feedstock. Those

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[4] Even with respect to the unenriched uranium itself, we have already pointed out that a person holding title to property does not always own the property when another person has rights to possess and use it. USEC Br. 50-53. By contrast, respondents cite nothing to support the notion that ownership of property is invariably determined by the locus of title alone.

requirements are inextricably linked: if the customer wishes to purchase LEU with a lower cash payment, then it must compensate by supplying more uranium, and *vice-versa*. As a result, both the amount of cash and the amount of unenriched uranium are necessary "price terms" for the acquisition of LEU under a SWU contract.[5]

Respondents make a similar error with regard to the calculation methodology used by Commerce to determine that dumping had occurred in this case, arguing that Commerce in effect valued only the SWU component, not LEU itself. But, as even respondents grudgingly acknowledge, Eurodif Br. 48; AHUG Br. 42, Commerce established values and prices for LEU, the subject merchandise, *in its entirety*, taking actual prices for the SWU component and adding a reasonable estimated value for the unenriched uranium component. Accordingly, because Commerce valued the whole article of imported merchandise (the LEU), any statutory requirement that the dumping margin be based on the full value of the imported merchandise—or any alleged jurisdictional prerequisite for the transaction to be deemed a sale of merchandise in the first place—has been satisfied. Whether Commerce correctly calculated the dumping margin is a separate question that is not before the Court.

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[5] Respondents claim that Commerce rejected the notion that the feedstock could be consideration. *See, e.g.*, Eurodif Br. 43 n.21. But Commerce plainly treated the feedstock as payment in kind—observing only that it might not be regarded that way "in the formal sense" (USEC Pet. 80a)—and it concluded that the arrangement is "dedicated to the delivery of the LEU...." *Id.* As a consequence, it sought to determine the value of what was exchanged for the LEU, not just for the SWU. *See id.* 216a-217a.

In any event, there is nothing suspect about Commerce's decision to use estimated values for the unenriched uranium component. Although AHUG dismissively refers to the estimates as the "fictitious input value," AHUG Br. 43, the values Commerce used were reasonable,[6] and its use of an estimate was consistent with the statute and its past practice. USEC Pet. 245a. Indeed, it would be difficult for Commerce to carry out the purposes of the statute without doing so. The courts have long recognized that Commerce has broad latitude in addressing the myriad complexities of dumping calculations. *See, e.g., Am. Silicon Techs*, 261 F.3d at 380-81 ("This court 'accords deference to the determinations of the agency that turn on complex economic and accounting inquiries'") (quoting *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996)).

It was also reasonable for Commerce to have assigned the same value to the unenriched uranium on both sides of the antidumping calculation—that is, for purposes of making a "fair comparison" (19 U.S.C. § 1677(a)) between the U.S. price at which LEU was sold and the constructed value of that merchandise. The appropriate valuation of an input is ultimately a question of fact, and respondents have not made any showing that different values would have been appropriate, much less required. And, while it is certainly true that the use of identical values for natural uranium on both sides of the equation isolated the pricing difference for the SWU component, the reason is obvious: Eurodif

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[6] Commerce valued the unenriched uranium delivered by utility customers on the basis of the prices that Eurodif charged its EUP customers for unenriched uranium during the period of investigation. USEC Pet. 83a-84a.

engaged in discrimination with respect to that component. The ultimate effect of that discrimination, in turn, was that Eurodif was selling LEU to consumers in the United States at prices below the constructed value of that merchandise, just what the antidumping law was intended to address.

## III. CASE LAW UNDER OTHER STATUTES AND COMMERCE'S TOLLING PRECEDENT ARE NOT CONTROLLING HERE.

### A. The Case Law Does Not Foreclose Commerce's Interpretation.

Although respondents and their *amici* rely on a wide variety of case law, only three cases—those finding that SWU transactions should be regarded as sales of services under other statutes—are particularly relevant. *See* Eurodif Br. 44-45. But none of those cases involved judicial review of an agency's interpretation of a statute that it was responsible for administering. As we have pointed out, *see supra* pp. 1-2, the critical question under *Chevron* is not whether a federal court could view SWU transactions as sales of services, but whether a federal agency acts unreasonably in treating them as sales of merchandise. The cited cases had no reason to, and thus did not, address the latter question.

Furthermore, the analysis in the *Florida Power & Light* case largely contradicts respondents' argument that SWU transactions are unquestionably sales of services. In contrast to the perfunctory analysis in *Barseback* and *Centerior*, Eurodif Br. 44-45, AHUG Br. 40 n.28, the Federal Circuit in *Florida Power & Light* engaged in a careful examination of whether SWU

transactions involved the "disposal of personal property" and concluded that it was a close question. Thus, the court of appeals compared SWU transactions, on the one hand, to a category of transactions in which the enricher made LEU without any contribution of uranium by the customer and, on the other hand, to transactions (albeit theoretical) in which the enricher made LEU from the very uranium supplied by the customer, ultimately acknowledging that SWU transactions "do[ ] not fall neatly into either of the above categories," 307 F.3d at 1373. But, where it is difficult to tell whether particular transactions fall within the terms of a federal statute, the teaching of *Chevron* is that the agency charged with administering the statute should have broad latitude to make the necessary determination.

The remaining cases cited by respondents and their *amici* have little or nothing to say about whether Commerce could reasonably regard SWU transactions as sales of merchandise. For example, many of the cited cases simply recite that the word "sale" should be given its ordinary meaning. *See* Alcoa Br. 16-19. But Commerce explicitly found that Eurodif transfers ownership of LEU for consideration, thereby satisfying the common definition of a sale. As a result, unless the cited cases employed some particularly narrow construction of the term "ownership"—and none of them does—they do not help respondents on the central issue here.

The final group of cited cases makes a different point: that the Robinson-Patman Act and similar statutes regulating sales of goods do not apply to sales of services. *See* Eurodif Br. 30; Alcoa Br. 17. But no one

contests that point. The Commerce Department did not decide that the antidumping law covers sales of services, but rather that SWU transactions were sales of merchandise. And respondents can hardly rely on these cases to show that it is a simple matter to distinguish between sales of goods and sales of services—and thus that Commerce was plainly out of bounds in finding a sale of goods here—because one of the cited Robinson-Patman Act cases says just the opposite. *See First Comics, Inc. v. World Color Press, Inc.*, 884 F.2d 1033 (7th Cir. 1989). There, the Seventh Circuit expressly noted that "[b]ecause of the functional overlap, the distinction between goods and services is not always clear. Many transactions are of a hybrid nature contemplating both goods and services . . . ." *Id.* at 1035. To say the least, that observation is more consistent with the existence of ambiguity than with the lack of it.[7]

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[7] Although the federal courts apply a "dominant nature" test under the Robinson-Patman Act to determine whether a transaction involves a sale of goods, *see, e.g., Aviation Specialties Inc. v. United Techs. Corp.*, 568 F.2d 1186 (5th Cir. 1978) (looking to dominant nature of contract), respondents have not urged application of that test here. Moreover, even if they had, it would be entirely reasonable for Commerce to conclude that the dominant nature of a SWU transaction is the acquisition of LEU, with the customer providing uranium and cash in order to obtain it. *See* USEC Pet. 80a (Commerce conclusion that a SWU contract is "dedicated to the delivery of LEU").

### B. Commerce May Reconsider The Issues In Its Tolling Precedent.

Respondents also rely on past administrative decisions by the Commerce Department applying the antidumping law in the context of so-called toller-tollee transactions. But, even if those prior decisions stand for the proposition that such transactions generally do not involve a sale of merchandise by the toller (manufacturer)—something that Commerce explicitly said (in dicta) in only one of the cited decisions (Response to Court Remand, *Taiwan Semiconductor Mfg. Co. v. United States*, No. 98-05-02184, slip op. 00-48 (June 2, 2000))—that viewpoint still would not prevent the agency from adopting a modified, even inconsistent, position now. That is particularly the case where Commerce has found, after more exhaustive analysis than in any of its past cases, that SWU transactions involve a transfer of ownership of the subject merchandise. Just as an agency may choose between various positions in the first place, it can change from one position to another as it develops additional understanding of the problems to be addressed.[8]

This Court has made that principle clear on numerous occasions. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), for

[8] The tolling regulation, 19 C.F.R. § 351.401(h) (2008), by its terms only applied "where the toller or subcontractor does not acquire ownership, and does not control the relevant sale of the subject merchandise." Accordingly, Commerce's conclusion that enrichers make a sale of merchandise when they deliver goods that they own to their customers is consistent with the tolling regulation, which has since been revoked but was in effect during the proceedings below.

example, the Court noted that "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis . . . ." *Id.* at 981 (internal quotation marks omitted) (ellipsis in original). Indeed, the rule could hardly be otherwise if an agency is to have the flexibility to learn from experience. Thus, "[a]n agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances." *Rust v. Sullivan*, 500 U.S. 173, 186 (1991) (internal citations and quotation marks omitted) (alteration in original).

Contrary to respondents' argument, an agency's decision to change its position on a question of interpretation does not mean that its later view gets only limited deference. Although the Court has sometimes said that an inconsistent agency viewpoint is entitled to less weight, *see* Eurodif Br. 33 (citing *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993)), more recent cases from this Court have not followed that path. As the Court pointed out in *Brand X*, "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." 545 U.S. at 981. To the contrary, "if the agency adequately explains the reasons for a reversal of policy, change is not invalidated since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Id.* (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)).

To be sure, as the above cases make clear, an agency must give a proper explanation for its adoption of a modified view. But Commerce has given an extensive explanation in this case, especially in its 2003 Final Remand Determination. *See* USEC Pet. 203a-231a; *see also* 241a ("the Department is authorized to depart from its prior practice as long as the agency articulates a reasoned analysis"). Most particularly, it has pointed out that its previous view was developed in the quite different context of determining whether *subsequent* sales of toll-produced merchandise by the customer should be considered the relevant sale for purposes of calculating antidumping margins. *Id.* 205a-208a. Commerce also explained that, in focusing on later sales by the customer, it did not consider the possible implications of its view in the present context (where the customer makes no further sale). *Id.* 205a. And, in its initial decision, it recognized that, if it were to treat toller-tollee transactions as merely sales of services—even where a transfer of ownership in the subject merchandise has taken place—it would be putting certain transactions in merchandise "squarely outside the realm of trade in goods, based solely on the way in which particular sales of such merchandise were structured." USEC Pet. 194a (quoting *Final French AD Determination*, 66 Fed. Reg. 65,877, 65,879 (Dec. 21, 2001)).

It would be particularly inappropriate to prevent Commerce from addressing that incongruity here. Although respondents do not mention it, the administrative history shows that, in the period immediately prior to the 1990s, Commerce treated toller-tollee transactions as sales of merchandise, not

as sales of services, and it calculated antidumping margins based on those sales. *See, e.g., Certain Small Diameter Welded Carbon Steel Pipes from the Philippines*, 51 Fed. Reg. 33,099 (Dep't Commerce Sept. 18, 1986) (final det.); *Brass Sheet and Strip from Canada*, 51 Fed. Reg. 44,319 (Dep't Commerce Dec. 9, 1986) (final det.); *Certain Television Receivers, Except for Video Monitors, from Taiwan*, 55 Fed. Reg. 47,093 (Dep't Commerce Nov. 9, 1990) (final det. admin review). When it departed from that approach in the 1990s in order to focus on the subsequent sale by the customer, it did so in order to eliminate what it saw as an unjustified difference in treatment between businesses that made goods themselves and then sold them, and businesses that obtained goods manufactured by subcontractors and then sold them. But, by shifting its attention to sales by the customer, Commerce inadvertently wound up creating another unjustified distinction—between sales of merchandise for cash and sales for a combination of cash and raw materials—that it is now seeking to correct. Under respondents' theory, however, Commerce would only have full latitude to make the first change, not the second, thereby denying deference to the agency for its more thoroughly considered position.

The reconsideration of how to treat transactions where customers provide raw material as well as cash to a manufacturer has also allowed Commerce to examine more carefully the respective roles of the manufacturer and its customers, and to focus its attention on two factors not specifically addressed in its prior decisions: the control by manufacturers over the production and disposal of the relevant goods and their

use of fungible inventories of raw material. The first factor reinforces the understanding that, in reality, the manufacturer possesses the essential attributes of ownership in the manufactured goods, while the second factor, at least in cases like this one, punctures any illusion that the buyer holds title to the raw material actually used in making the merchandise delivered to that buyer. Taken together, they strongly indicate that the manufacturer is making a sale of the produced merchandise, not just giving back the customer's own goods in modified form. While the agency presumably could have settled on that conclusion at an earlier time, it was not limited to just one look at the issue, and its current view should be upheld so long as it is reasonable and properly explained. That is the case here.

## IV. COMMERCE'S DETERMINATION FULFILLS THE PURPOSES OF THE ANTIDUMPING LAW.

Respondents argue that the decision below does not create a serious loophole in the antidumping law because the law can just be applied to subsequent sales by the customer. Eurodif Br. 53; AHUG Br. 49. That answer is cold comfort when there is no later sale, of course, but respondents suggest that such instances are rare. In fact, many imported goods (such as equipment, printing presses, and other tools of production) are not resold at all, but are used by the purchasers to produce other goods. Under respondents' theory, if the foreign manufacturer arranges for a purchaser to provide the raw materials for such goods, the transfer of those goods by the manufacturer would be a sale of manufacturing services beyond the reach of the antidumping law.

Even leaving aside goods that are consumed by the buyer, respondents' efforts to downplay the potential loophole are unpersuasive. While Commerce might be able to impose duties on a subsequent sale of the identical good,[9] it is by no means certain that Commerce would be able to apply the antidumping law to the sale of a *different* good that merely incorporates the imported merchandise. As a result, foreign companies would have a potential exemption from antidumping duties for the sale of component parts so long as they structured their deals as sales for cash and raw materials, rather than for cash alone. For example, magnesium from China and Russia is currently subject to antidumping orders, which *amicus* Alcoa has opposed. (Alcoa is the "world's largest consumer of magnesium" in connection with its production of aluminum products.)[10] If the Federal Circuit decision is upheld, however, Alcoa might be able to obtain magnesium from China and Russia without regard to those orders simply by supplying foreign manufacturers with the raw material needed to make magnesium and then incorporating the foreign manufactured merchandise into Alcoa products.

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[9] In light of the Federal Circuit's broad declaration that "LEU produced as a result of [SWU] contracts is not subject to the antidumping law," USEC Pet. 19a, however, it is not clear that the Federal Circuit would conclude that Commerce has authority to apply the antidumping statute to transactions that take place after such excluded merchandise has been imported.

[10] *In the Matter of Magnesium From China and Russia*, Inv. Nos. 731-TA-1071 and 1072 (Final), Hr'g Tr. 153, 156 (Feb. 23, 2005), available at http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2004/magnesium/final/PDF/Hearing-open%2002-23-05.pdf (statement of Robert McHale, Vice President of Alcoa Materials Management).

With respect to LEU imports from Russia, Congress recently enacted emergency appropriations legislation that included a provision to ensure that the uncertainty created by the Federal Circuit's decision does not adversely impact continued imports of LEU down-blended from nuclear weapons.[11] The quotas on Russian LEU in the legislation are tied to completing the existing HEU agreement, and expressly cover all forms of Russian LEU imports, including imports under SWU transactions. While this legislation significantly reduces the threat to the domestic enrichment industry of dumped LEU from Russia, it does not at all affect the continued threat of dumping of LEU from France. The International Trade Commission has recently found that such imports would have a significant adverse impact on the domestic industry. *See* USEC Br. 56 n.16.

Lastly, respondents and their *amici* argue that the antidumping statute is a "narrowly focused statute" Alcoa Br. 6, that should not be broadened by this Court. AHUG Br. 19. But their contentions with respect to the law's narrow focus are based solely on their repeated statements that (1) the law applies only to sales of goods, not sales of services, and (2) a sale of goods requires a transfer of ownership of the subject merchandise. Eurodif Br. 22; AHUG Br. 18-19. No one disputes the first point, and the decision by Commerce in this case

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[11] 2009 Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. No. 110-329, § 8118, 122 Stat. 3574 (2008) (to be codified at 42 U.S.C. §§ 2297h *et seq.*). Section 8118 is entitled "Incentives for Additional Downblending of Highly Enriched Uranium by the Russian Federation."

fully meets the transfer of ownership standard contemplated by the second. And, if there is a question regarding how the antidumping law should be applied to protect U.S. manufacturers, Kazatomprom Br. 12, Congress put the Executive Branch, through the Commerce Department, in charge of striking that balance.

When all is said and done, respondents simply offer no good reason to believe that Congress meant to exempt import transactions of this kind from the antidumping law. As Commerce observed, and respondents do not refute, the importation of LEU pursuant to SWU contracts has precisely the same adverse effect on domestic industry as the importation of LEU pursuant to EUP contracts. Yet, under respondents' approach, the latter would be subject to the antidumping law while the former would not. Given that Congress unquestionably intended to protect domestic competitors from sales of foreign merchandise at less than fair value, it is hard to see why Congress would want coverage of the statute to depend entirely on how the private parties structured their transaction—whether the buyer gave the enricher all cash or a combination of cash and raw material—rather than on its essential character (the buyer's acquisition of LEU for consideration). Although respondents evidently think that federal agencies must treat contractual arrangements—even ones that depend on a "fiction"—as conclusive, Commerce acted within its discretion in rejecting that position and concluding that all LEU transactions fall within the scope of the antidumping statute. That ruling should be upheld.

## CONCLUSION

The decision of the United States Court of Appeals for the Federal Circuit should be reversed.

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No. 07-1059 and 07-1078

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

EURODIF S.A., ET AL.

USEC, INC., ET AL., PETITIONERS

*v.*

EURODIF S.A., ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FEDERAL CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

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## REPLY BRIEF FOR THE UNITED STATES

In the administrative decisions at issue in this case, the Department of Commerce (Commerce) reasonably construed 19 U.S.C. 1673(1) to encompass foreign merchandise that enters the commerce of the United States at prices below fair value, whether the U.S. customer obtains the merchandise in exchange for cash alone or in exchange for a combination of cash and raw materials. The Federal Circuit erred in substituting its own interpretation of Section 1673(1) for the reasonable construction of the expert agency, thereby creating a loophole that encourages evasion of the Nation's fair trade laws

on a matter of substantial concern. That decision should be reversed.

In defending that decision, respondents attack the agency's determination that low enriched uranium (LEU) acquired via separative work unit (SWU) contracts is "sold" within the meaning of Section 1673(1). But in reaching that determination, Commerce reasonably attached primary significance to the economic substance of those transactions, and to the manner in which the enrichment process is actually performed, rather than according dispositive weight to the contracting parties' characterizations of their own arrangements. Respondents' contrary approach, under which Commerce was required to accept conceded legal fictions embodied in the parties' contracts, would undermine the statutory scheme and facilitate evasion of antidumping duties. Commerce reasonably concluded that Congress did not compel that counterintuitive result.

### A. Commerce Reasonably Concluded That LEU Produced Pursuant To SWU Contracts Is "Sold" Within The Meaning Of The Antidumping-Duty Statute

The application of the antidumping-duty law to the circumstances here depends on whether LEU produced under SWU contracts is "foreign merchandise" that "is being, or is likely to be, sold in the United States," 19 U.S.C. 1673(1). Respondents do not appear to dispute that the LEU at issue in this case is "foreign merchandise" within the meaning of Section 1673(1). They contend (Eurodif Br. 21-34; Ad Hoc Utilities Group (AHUG) Br. 23-49), however, that the LEU is not "sold," pointing to definitions of the noun "sale" as a "transfer of ownership of property in exchange for con-

sideration." Eurodif Br. 22. Those definitions, however, do not undercut the agency's determinations.

In concluding that LEU acquired pursuant to SWU transactions is "sold in the United States," Commerce expressly found that the transactions effected a "transfer of ownership" in the relevant merchandise. See, *e.g.*, Pet. App. 131a ("[T]hese sales represent the transfer of ownership in the complete LEU product for consideration."); *id.* at 256a (under SWU contracts, "ownership of the LEU is only transferred to the utility customer upon delivery of the LEU").[1] To demonstrate that Commerce's determination is foreclosed by the "unambiguously expressed intent of Congress," *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984), it is therefore insufficient for respondents to show that a transfer of ownership is required to trigger the antidumping-duty statute. Respondents must also establish that the concept of "transfer of ownership" *necessarily* includes criteria that their LEU transactions failed to satisfy, so that Commerce acted *unreasonably* in concluding that such a transfer had occurred. Respondents cannot make that showing.

1. Commerce reasonably determined that SWU transactions result in a transfer of ownership of LEU—and thus in LEU being "sold" within the meaning of the antidumping-duty statute—for at least three reasons.

a. From the customer's perspective, a SWU transaction results in a transfer of ownership because the customer obtains merchandise that it did not own at the outset. The customer provides to the manufacturer a quantity of cash and raw materials, and it receives, in

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[1] References in this brief to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 07-1059.

return, a manufactured product that is (as respondents acknowledge, see Eurodif Br. 39), a new article of commerce that is an "entirely different * * * product." Pet. App. 240a. As a factual matter, moreover, the LEU product that a utility receives in a SWU transaction is not produced from the particular feedstock that the utility provided. A SWU transaction therefore results in a transfer, in exchange for payment, of a commodity that the purchaser did not previously own. From the customer's perspective, that would be true even if the enricher delivered LEU produced from the very feedstock the customer had provided. Because the enrichment process fundamentally transforms the feedstock from which it is produced, it results in a new article of commerce that the utility did not own at the outset of the transaction. But the transfer of ownership is particularly clear where, as here, the manufactured product bears no physical relationship to any raw materials the customer could previously have been said to own.[2]

b. Focusing specifically on the SWU contracts and on other record evidence, Commerce found that "utility customers hold title to the natural uranium feedstock that they provide to the enrichers," but that utilities do not have or receive title to the finished LEU immediately upon its production. Pet. App. 132a, 133a; see, *e.g.*,

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[2] Section 1673(1) encompasses merchandise that "is being, or is likely to be, sold in the United States." The statute's use of the passive voice reflects Congress's intent to reach imported merchandise that has been transferred to a domestic customer for consideration. But the threshold determination that particular merchandise has been "sold" does not require precise identification of the seller. Thus, even if respondents could show that enrichers never acquire ownership of LEU or the feedstock from which it is produced, Commerce could nevertheless reasonably conclude that the LEU is "sold in the United States."

Confidential J.A. 17, 333. Rather, Commerce concluded that "between the time in which the LEU is produced and the time in which it is delivered as specified under the contract, the enricher holds title and holds ownership in the complete LEU product." Pet. App. 133a. Commerce thus determined that the transfer *to* the customer of title to the LEU that occurs at the time of delivery is a transfer *from* the enricher. Although respondents dispute that proposition, see, *e.g.*, AHUG Br. 40 ("Obviously the enricher cannot convey title to uranium it does not own."), they identify no *other* entity that could plausibly be thought to own the LEU between the completion of the enrichment process and the delivery to the customer.

c. Commerce reasonably concluded that, although the utility contractually retains title to its original feedstock while the enrichment process is ongoing, the enricher rather than the utility exercises the prerogatives that are customarily associated with ownership. The enricher accepts feedstock with no obligation to return any specific lot to any particular customer, but instead treats the feedstock as part of an undifferentiated inventory. Pet. App. 133a. The enricher may draw from that inventory more or less feed uranium than the customer had supplied to produce the customer's desired quantity of LEU. *Id.* at 253a. Indeed, an enricher may satisfy its obligations under a contract by delivering the finished LEU product *before* it ever receives feed uranium from the customer. *Id.* at 133a.

2. Respondents do not dispute Commerce's understanding of the manner in which the enrichment process is actually performed. Rather, they contend that Commerce was required to accept the contracting parties' own characterization of SWU transactions as contracts

for enrichment "services," under which utilities are "deemed" to receive back their original feedstock in enriched form. See, *e.g.*, Eurodif Br. 36-37; AHUG Br. 40-41. That argument is misconceived.

a. In construing other statutory provisions that use the word "sale," this Court has not required that the relevant transfer of ownership be accomplished through a single contract that is expressly denominated by the parties as one for the sale of goods, cf. AHUG Br. 51, or that contains formal provisions for the transfer of title, cf. Eurodif Br. 36. See *e.g.*, *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 400 (1965). Contrary to respondents' contention (Eurodif Br. 24-26; AHUG Br. 28), this Court's willingness to look beyond contractual formalities to economic realities has not been limited to circumstances in which the form of a transaction was designed to circumvent the regulatory scheme in question. Rather, this Court has made clear that its approach does not rest on "impugning in any way the good faith and genuineness of the transactions." *United Gas*, 381 U.S. at 400.

b. The purposes of the antidumping-duty law would be disserved if Commerce were required to give dispositive effect to contracting parties' characterizations of their own transactions—effectively granting parties the option of contracting around the fair trade laws. The statute is not designed to define the rights and obligations of utilities and enrichers (or customers and producers more generally) vis-à-vis each other. Rather, its purpose is to prevent would-be dumpers and their customers from entering into agreements that are mutually beneficial to the contracting parties but that unfairly disadvantage domestic competitors. That purpose would be subverted if Commerce were inflexibly bound

by contractual assertions (*e.g.*, that the LEU a utility receives is "deemed" to have been produced from the utility's own feedstock) that are demonstrably contrary to fact. Respondents contend that "this 'legal fiction' is a contractual and economic reality that defines both the transaction as a whole and the legal rights that flow from it." AHUG Br. 41. But even assuming that the inclusion of a contractual "deeming" provision significantly affects the parties' rights and obligations under *other* bodies of law, the prospect of such consequences did not obligate Commerce to treat the fiction as true for purposes of the antidumping-duty statute.

AHUG's contention (Br. 41) that "this 'legal fiction' * * * is critical to regulation of the entire nuclear fuel cycle" is likewise misplaced. Even assuming that the SWU contracts' title and "deeming" provisions are essential to the orderly implementation of the agreements, nothing in Commerce's determination precludes utilities and enrichers from continuing to rely on those terms. Rather, reversal of the court of appeals' decision would simply mean that SWU contracts are subject to the antidumping-duty law. For similar reasons, the fact that the contracting parties had valid economic motives for structuring their transactions as they did (*e.g.*, Eurodif Br. 6-7; AHUG Br. 10-12), and did not craft the contracts' title and "deeming" provisions in order to evade the antidumping-duty law, does not cast doubt on the validity of Commerce's determination here. In many transactions where the consideration provided by one party is partly in cash and partly in kind (as where a customer provides both money and a used car in exchange for a new vehicle), a valid economic motive exists, but the transaction still results in merchandise being "sold."

c. As amended in 1984, the antidumping-duty law provides that "a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding merchandise that is equivalent to the sale of merchandise." 19 U.S.C. 1673. That provision strongly indicates that application of the statute need not turn on technicalities of title transfer, or on whether the set of transactions culminating in the transfer of merchandise is expressly denominated as a sale by the parties. See Gov't Br. 30-31. As respondents correctly observe (Eurodif Br. 26-27; AHUG Br. 27), the lease provision quoted above does not *compel* the conclusion that Section 1673(1) encompasses the contract-manufacturing transactions at issue in this case. But the statutory directive to consider substance rather than form in evaluating lease transactions strongly suggests that Congress did not intend to *preclude* Commerce from applying the antidumping-duty law to other transactions that are "in effect transfers of ownership." H.R. Rep. No. 725, 98th Cong., 2d Sess. 11 (1984).

d. As a result of SWU transactions, utilities receive finished LEU that bears no necessary relation to any particular feed uranium they have provided to the enricher—that is to say, to any component of the finished product they could be said to have "owned" before the transaction took place. At common law, a transaction with those general contours was generally treated as a "sale." See, *e.g.*, *Sturm* v. *Boker*, 150 U.S. 312, 329-330 (1893); *Powder Co.* v. *Burkhardt*, 97 U.S. 110, 116 (1878); Gov't Br. 48-49.

Respondents contend (Eurodif Br. 41-42; AHUG Br. 44-45) that those early cases distinguishing "bailments" from "sales" are inapposite because the background rule they announced could be superseded by evidence that

the parties to the contract intended a different result. Here, however, Commerce had a sound basis for declining to give decisive effect to the parties' intent—namely, that regulated entities should not be allowed to contract out of the statutory obligations that the antidumping-duty law imposes. See pp. 6-7, *supra*. Commerce thus acted reasonably in concluding that the applicability of the statute does not turn on whether the parties to the relevant contract themselves characterized their transaction as a "sale of merchandise." Having permissibly determined that the parties' characterization should not control, Commerce also acted reasonably in giving weight to a factor that the common law treated as decisive in cases where the parties' intent was unknown.

3. Respondents contend that "[t]he price term in [the] SWU contracts underscores that only enrichment services are sold" because "[t]he contracts do not contain any price term covering uranium." Eurodif Br. 37; see AHUG Br. 41-42. But when respondents refer to the "price term" of the contract, what they mean is the *cash* price term. Under a SWU contract, the consideration that a utility must provide in order to receive a specified quantity and assay of LEU consists not only of cash, but also of the feedstock that utilities must provide as part of the bargained-for exchange. As Commerce explained, "the things of value provided by the utility customer to the enricher (cash and natural uranium) account for the full value of the LEU received by the customer from the enricher." Pet. App. 128a n.34.

Respondents argue that the feedstock provided by utilities under SWU contracts cannot be considered a component of the price of LEU because the contracting parties do not regard that feedstock as "a form of payment." Eurodif Br. 43 n.21; see AHUG Br. 42. Com-

merce recognized that "the provision of uranium feedstock may not be a payment-in-kind *in the formal sense under these contracts*." Pet. App. 254a (emphasis added). Contrary to Eurodif's contention (Br. 43 n.21), however, Commerce did not thereby reject the proposition that feedstock is *in fact* part of the consideration that a utility provides under a SWU contract. Rather, Commerce simply acknowledged that the contract does not describe it as such. As with the contractual provision "deeming" the LEU a utility receives to have been produced with the utility's feedstock, Commerce declined to treat as dispositive the formalities of the parties' agreement. Pet. App. 254a-255a. Looking "beyond the four corners of the contract" to the "totality of circumstances surrounding the transactions," Commerce reasonably concluded that "the overall arrangement under [SWU contracts] is, in effect, an arrangement for the purchase and sale of LEU," and not only the "service" of producing LEU. *Ibid.*

In practical terms, the feedstock provided under a SWU contract is naturally regarded as part of the consideration or "price" paid for the LEU. The amount of cash a utility must provide to obtain a given quantity and assay of LEU will vary depending upon the amount of feedstock the utility provides.[3] And because the enricher controls how much feed to use, and how much enrichment to perform, the cash paid by the utility may

---

[3] By the same token, a utility seeking to acquire a given quantity and assay of LEU would be required to pay more cash in an enriched uranium product (EUP) contract than in a SWU contract, even though the utility would receive the same merchandise in the end. The obvious explanation for that disparity is that cash is the *only* consideration the utility gives in an EUP contract, whereas it provides additional consideration in a SWU contract.

not equal the negotiated value of the enrichment processing actually performed by the enricher, just as the value of the feed the utility provides may not equal the value of the feed the enricher actually uses to produce LEU. Eurodif's statement (Br. 43 n.21) that "[t]he feed is not a form of payment, but a raw material in need of processing," rests on a false dichotomy. Although the feedstock is unquestionably a raw material essential to the production of LEU, that does not prevent it from *also* being an element of the price. To the contrary, precisely because the feedstock is essential to the production of LEU, it has obvious value to the enricher, since it obviates the enricher's need to obtain from another source feed uranium to replenish its inventory.

4. For substantially the same reasons, respondents are wrong in arguing (Eurodif Br. 48-50; AHUG Br. 29 & n.21, 42-43) that Commerce's calculation of the dumping margin in this case casts doubt on the agency's imposition of antidumping duties. Consistent with its determination that SWU transactions represent a transfer of the complete LEU product for a price, Commerce calculated the dumping margin in this case by comparing the total price of LEU, in both cash and feedstock, to the normal value of LEU sold in the home market. See Pet. App. 257a. Respondents object to the agency's calculation methodology on the ground that Commerce used the same estimated value for natural uranium on both sides of the equation, and thereby "eliminat[ed] the estimated uranium value from the dumping determination entirely." AHUG Br. 43. But it does not follow that, as respondents contend, Commerce effectively treated the cash price of enrichment services as "the price for the LEU as a whole," *ibid.*, and thereby violated the statutory command to calculate a dumping

margin for "merchandise." Respondents may disagree with the manner in which Commerce calculated the non-cash price of LEU in SWU transactions, but that disagreement is logically distinct from the broad claim that it is categorically unreasonable for Commerce to consider the non-cash price of merchandise in determining whether it is "sold" for purposes of Section 1673. The question whether Commerce properly valued the non-cash component of the price of LEU produced pursuant to SWU transactions is not at issue in this case.

5. Respondents contend (Eurodif Br. 30, 44-45; AHUG Br. 39 n.28) that Commerce's decision is inconsistent with lower-court cases in which the government has successfully argued, based on many of the same contractual features that respondents highlight here, that SWU contracts are not "contract[s] * * * for * * * the disposal of personal property" under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 602(a), see *Florida Power & Light Co.* v. *United States*, 307 F.3d 1364 (Fed. Cir. 2002), or "contracts for the sale of goods" for purposes of the Uniform Commercial Code (UCC), *Barsebäck Kraft AB* v. *United States*, 36 Fed. Cl. 691, 705 (1996), aff'd, 121 F.3d 1475 (Fed. Cir. 1997); accord *Centerior Serv. Co.* v. *United States*, No. 95-103c, 1997 U.S. Claims LEXIS 323, at *19 (Fed. Cl. Dec. 29, 1997). That argument lacks merit.

Unlike the provisions at issue in those cases, the antidumping-duty statute does not apply to *contracts*; it applies to *merchandise* that is being, or is likely to be, sold at unfair prices in the United States. And also unlike those statutes, the antidumping-duty law does not define, or provide a mechanism to resolve disputes concerning, the rights and obligations of contracting parties *with respect to one another*. The form of the contracting

parties' agreement is logically a paramount consideration in settling a dispute concerning their respective contractual rights and obligations. But it must necessarily carry less weight where, as here, the purpose of the statute is to remedy the adverse effects on third parties of bargains that are mutually beneficial to the signatories. See pp. 6-7, *supra*.

Moreover, even in the contract-dispute context, the court of appeals in *Florida Power & Light* acknowledged that SWU contracts do "not fall neatly" on either side of the line that divides contracts for services from contracts for goods. See 307 F.3d at 1373. That the court regarded that question as close suggests that a contrary conclusion would not have been unreasonable. It follows that Commerce acted permissibly in finding a sale of merchandise in this case, based on the language of a different statute with different purposes.

6. Eurodif suggests (Br. 30) that the antidumping-duty statute should be read *in pari materia* with the Robinson-Patman Act, which forbids price discrimination when "commodities are sold * * * within the United States." 15 U.S.C. 13(a). Contrary to respondent's characterization, however, cases decided under the Robinson-Patman Act have not categorically held that "processing operations are service transactions outside the scope of the [Act]." Eurodif Br. 30. Rather, acknowledging that "the distinction between goods and services is not always clear," and that "[m]any transactions are of a hybrid nature, contemplating both goods and services," the courts have asked whether the "dominant nature" of the transaction is the performance of a service or the delivery of a commodity. *First Comics, Inc.* v. *World Color Press, Inc.*, 884 F.2d 1033, 1035 (7th Cir. 1989), cert. denied, 493 U.S. 1075 (1990). Respon-

dent does not contend that all statutory references to sales of commodities unambiguously call for application of a similar "dominant nature" test, and thus preclude expert agencies, such as Commerce, from formulating a different test in a manner consistent with the relevant statutory scheme.

### B. Commerce's Now-Repealed Tolling Regulation And Prior Decisions Do Not Invalidate Its Determination In This Case

Respondents place heavy reliance on Commerce's recently withdrawn regulation concerning the proper calculation of antidumping duties in cases involving so-called "tolling," or subcontracting, operations, and the language of decisions interpreting that regulation. Eurodif Br. 32-34, 51-52; AHUG Br. 32-39; see 19 C.F.R. 351.401(h) (2007), withdrawn by 73 Fed. Reg. 16,517 (2008). They contend that Commerce's past practice under the tolling regulation compels a finding that the kind of contract-manufacturing transactions at issue in this case are beyond the reach of the antidumping-duty law. That argument lacks merit.

1. As the government explained in its opening brief (at 39-44), the tolling regulation, when it was in effect, did not purport to interpret Section 1673's threshold criteria for determining whether merchandise is "sold in the United States" and is therefore subject to the antidumping-duty statute. The regulation focused instead on Commerce's calculation of the export price, constructed export price, and normal value of subject merchandise under Sections 1677a and 1677b. See 19 C.F.R. 351.401(a). Under those provisions, Commerce must generally begin to calculate a dumping margin by identifying "the price at which the subject merchan-

dise is first sold * * * by the producer or exporter of the subject merchandise." 19 U.S.C. 1677a(a) (defining "export price"); see 19 U.S.C. 1677a(b) (defining "constructed export price"). The terms "producer" and "exporter" are not defined in the statute. Cf. 19 U.S.C. 1677(28) (defining the term "exporter or producer" as "the exporter of the subject merchandise, the producer of the subject merchandise, or both where appropriate"). Where multiple parties could plausibly be thought to fill the role of producer and/or exporter, Commerce has discretion to select among them.

Commerce initially treated so-called "toll-manufacturers"—entities that produced merchandise pursuant to subcontracting, or "toll," arrangements—as "producers" for purposes of Section 1677a and 1677b, and calculated dumping margins based on the fees they charged. See Pet. App. 127a-128a (citing decisions). Commerce subsequently adopted the policy embodied in the tolling regulation. That regulation provided that Commerce would "not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise," 19 C.F.R. 351.401(h) (2007), and thus would not use the price set by the toller to calculate the dumping margin for subject merchandise. Because the regulation addressed the distinct question of dumping-margin calculations, it did not, as the Court of International Trade (CIT) itself recognized, "provide a basis to exclude merchandise from the scope of an antidumping investigation," Pet. App. 191a (citation omitted), and Commerce has never applied the regulation to reach such a result, *id.* at 235a.

2. Respondents contend (Eurodif Br. 33-34; AHUG Br. 34 n.23) that the tolling regulation is nevertheless

relevant to the question presented here because the same logic that led Commerce to determine that certain tollees do not make the "relevant sale" of subject merchandise for purposes of calculating the dumping margin should also have led Commerce to conclude that toll-produced merchandise is not "sold" at all. According to respondents, Commerce has, in one decision, made precisely that connection, stating that "a subcontractor's or toller's price does not represent all elements of value," and that, where the contractor "already owns an essential portion of the product," Commerce "do[es] not consider the 'sale' between the subcontractor and such contractor to be a sale of subject merchandise at all." Response to Court Remand at 5, *Taiwan Semiconductor Mfg. Co.* v. *United States*, 143 F. Supp. 2d. 958 (Ct. Int'l Trade 2001) <http://ia.ita.doc.gov/remands/00-48.htm> (*Taiwan Semiconductor Remand Response*) (emphasis omitted).

The question in *Taiwan Semiconductor*, however, as in Commerce's other determinations applying the tolling regulation, was not whether merchandise had been "sold" within the meaning of Section 1673(1), but rather how to calculate the dumping margin. *Ibid.*; see Pet. App. 235a-236a. And in answering that question, Commerce did not conclude that the toller was automatically disqualified from consideration as the "producer" of the merchandise, but instead conducted an inquiry into the relative roles of the parties in the manufacturing and sales process, and determined that the tollee, which owned and controlled the proprietary design for static random access memory semiconductors, played a more significant role than the foundry that produced the wafers according to the tollee's design, and therefore made the most significant contribution to the dumping

margin. See *Taiwan Semiconductor Remand Response* at 5.

Furthermore, as Commerce recognized in its determination in this case, the dicta in *Taiwan Semiconductor* rested on a false premise. While a toller's "*cash* price * * * may reflect less than 100 percent of the value" of the merchandise, Pet. App. 129a (emphasis added), toll transactions may nevertheless reflect "the full value" of the merchandise where, as here, the bargained-for exchange contemplates the provision of both cash and a quantity of raw materials, see *id.* at 128a n.34, 130a-131a. To the extent the decisions suggested that the transaction between toller and tollee could *never* result in a relevant sale for purposes of calculating the dumping margin, simply because the cash price under the transaction reflected less than the full value of the merchandise, Commerce in this case reasonably determined that such a result would frustrate the purpose of the regulation and of the antidumping-duty statute in a situation where, as here, the tollee does not sell the toll-produced merchandise. *Id.* at 124a, 128a-129a, 157a-158a. Commerce accordingly calculated the dumping margin in this case "by combining the price of the enrichment component with the value of the natural uranium feed component to obtain the full value of the subject merchandise sold to U.S. utility companies." *Id.* at 130a-131a.

3. Even if the tolling regulation and prior administrative decisions were relevant to the issue in this case, they would not support respondents' position here. By its terms, the tolling regulation applied only when the tollers neither acquired ownership nor controlled the relevant sale of the subject merchandise. 19 C.F.R. 351.401(h) (2007). Commerce found, based on the total-

ity of the circumstances, that neither condition is present here because the enricher both owns the LEU it produces and controls the relevant sale. See Pet. App. 126a. And although the CIT rejected Commerce's conclusion as inconsistent with past decisions concerning various other types of tolling arrangements, see *id.* at 50a-56a, 188a-207a, the tollers in those arrangements did not exert the type of control over the production process that enrichers exert in the course of SWU transactions. See *id.* at 137a-145a.[4]

### C. Commerce's Determination Gives Effect To The Antidumping-Duty Statute's Intended Scope

Commerce's decision in this case serves important statutory objectives and represents a "reasonable policy choice" that warrants deference from a reviewing court. See *Chevron*, 467 U.S. at 845.

1. As the government explained in its opening brief (at 34-39), Commerce's decision in this case ensures that foreign manufacturers and domestic producers cannot contract around the Nation's fair trade laws. Respondents contend (Eurodif Br. 53; AHUG Br. 49) that the government's concerns about evasion are overstated. In respondents' view, the effect of the decision below is limited by the unique circumstance that the merchandise in question is consumed by the domestic customer

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[4] Respondents contend that Commerce's decision to withdraw its tolling regulation represents an "irrational departure" from its prior policy. Eurodif Br. 33 (quoting *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996)); see AHUG Br. 37. It was wholly rational, however, for Commerce to withdraw a regulation that had been interpreted, by a court that has exclusive jurisdiction to review the agency's determinations, to compel a result that the agency did not intend and does not regard as consistent with the objectives of the statute. See 73 Fed. Reg. at 16,517 (explaining Commerce's withdrawal of the tolling regulation).

rather than resold in tangible form. According to respondents, Commerce can always impose antidumping duties on those subsequent sales; it is "[o]nly goods that are never sold, and therefore cannot be dumped," that are "outside the scope of the antidumping law." AHUG Br. 49.

Respondents' attempts to minimize the government's legitimate concerns are unavailing. As an initial matter, even if the loophole were limited in the manner that respondents suggest, the circumstances of this case are scarcely unique. Respondents offer no reason to think that it is rare that imported merchandise is, for example, consumed or utilized in the buyer's operations, rather than resold in some tangible form (*i.e.*, in a form other than electricity).

As a practical matter, if foreign merchandise is excluded from the scope of an antidumping-duty order, as were the LEU imports at issue in this case, see Pet. App. 3a, Customs does not suspend liquidation of the entry documents, nor does it collect deposits of antidumping duties. 19 U.S.C. 1673b(d)(1)(B) and (d)(2). There is no mechanism for Customs to collect antidumping duties in the event that non-subject merchandise is eventually resold in some fashion after it enters the United States.

Moreover, if foreign merchandise that is not subject to the antidumping-duty law when imported is incorporated into other items of merchandise, and that new merchandise is later sold in a downstream transaction, it is far from clear that Commerce would have the statutory authority to capture lost antidumping duties by treating the sale of the new product as though it were a sale of the imported merchandise alone. To do so would involve substantial practical difficulties. Although re-

spondents suggest that Commerce could rely on Section 1677a(d)(2), which permits Commerce to subtract "the cost of any further manufacture or assembly" when calculating a constructed export price, such an approach would mean that Commerce would have to attempt, for example, to derive the price of imported steel based on the price of a car. Recognizing the practical difficulties associated with such an approach, Congress created a "[s]pecial rule" that allows Commerce to calculate the constructed export price of imported merchandise to which substantial value is added by, *inter alia*, looking to the price of other subject merchandise sold by the producer or exporter, or "on any other reasonable basis." 19 U.S.C. 1677a(e). That rule, however, by its terms applies only to transactions involving affiliated parties. *Ibid.* The approach respondents propose would require Commerce to undertake its dumping calculations based on transactions between unaffiliated parties, and thus without the benefit of the special rule. There is no reason to think that Congress intended that result.

Respondents also suggest (Eurodif Br. 52; AHUG Br. 53) that Commerce can avoid willful evasion of the antidumping-duty laws by enforcing the anti-circumvention provisions of 19 U.S.C. 1677j. Section 1677j enables Commerce to address certain *forms* of circumvention. For example, it permits Commerce to include within the scope of an antidumping order any foreign parts or components that may be assembled in the United States to produce merchandise of the same kind or class as foreign merchandise that is subject to an antidumping-duty order. See 19 U.S.C. 1677j(a). But it does not provide general authority for Commerce to address any and all forms of "strategic circumvention of antidumping restrictions." Eurodif Br. 52. Nor does it forbid parties

from redrafting their contracts and restructuring their sales, even for the specific purpose of "evad[ing] the law." Cf. AHUG Br. 53.

2. The prospect of evasion of the fair trade laws is, as the government has previously explained, see Gov't Pet. 25-31; Gov't Br. 37-39, a matter of considerable concern, particularly in the sensitive context of trade in enriched uranium. After our opening brief was filed, Congress passed, and the President signed into law, legislation that addresses imports of LEU from Russia through 2020. See Department of Defense Appropriations Act, 2008, Pub. L. No. 110-329, Div. C, § 8118, 122 Stat. 3647 (to be codified at 42 U.S.C. 3112A). That law provides incentives for the Russian Federation to continue full implementation of its 1993 agreement with the United States to downblend weapons-grade uranium into LEU for purposes of generating electricity, and to continue to downblend such uranium after the expiration of the HEU Agreement in 2013, by imposing import quotas on LEU (including LEU obtained under SWU contracts) through 2020 that are independent of the quotas established in Commerce's order suspending an antidumping investigation into imports of Russian LEU. *Ibid.*; see Agreement Concerning the Disposition of Highly Enriched Uranium Extracted From Nuclear Weapons (HEU Agreement), Feb. 18, 1993, U.S.-Russian Fed'n, Hein's No. KAV 3503, State Dep't No. 93-59, 1993 WL 152921; cf. *Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan*, 57 Fed. Reg. 49,235 (Dep't of Commerce 1992) (notice of suspension of investigations and amendment of preliminary determinations).

The legislation thus responds to one of the most significant implications of the decision below: the potential

for undermining full implementation of the HEU Agreement, a key element of this Nation's nonproliferation policy. It remains the case, however, that the proper application of this Nation's fair trade laws generally, and their application to trade in enriched uranium in particular, is a matter of considerable importance. As the government explained in its petition for a writ of certiorari (at 30-31), the United States relies on the availability of domestic sources of enriched uranium for certain military purposes, including the production of tritium, a radioactive isotope necessary to maintain the United States' nuclear arsenal, and as a prospective source of fuel for the Navy's nuclear-powered submarines and aircraft carriers. Unchecked by the fair trade laws, unfairly priced imports would threaten the viability of the domestic enrichment industry, and thus the United States' ability to acquire materials critical to military operations.

Respondents suggest (Eurodif Br. 54-55; AHUG Br. 54-58) that the government already has a sufficient "stockpile" of enriched uranium, can "recycl[e]" the materials it already has, and could, if necessary, undertake to operate USEC's enrichment facilities itself. Respondents, like the courts, are particularly ill-positioned to make such assessments. And, in any event, respondents are incorrect. The availability of sources to replenish the United States' supply of essential nuclear materials is a matter of considerable concern, and the ramifications of responding to that concern by undertaking to renationalize USEC's operations are scarcely inconsequential.

3. Eurodif and respondents' amicus contend that a reversal of the court of appeals' decision would conflict with the United States' obligations under the General

Agreement on Tariffs and Trade 1994 (GATT), 1 H.R. Doc. No. 316, 103d Cong., 2d Sess. 1339 (1994), and the Agreement on Implementation of Article VI of the GATT (Antidumping Agreement), 1 H.R. Doc. No. 316, *supra*, at 1453, because those agreements do not permit imposition of antidumping duties on services or processes alone. See Eurodif Br. 57; Bhala Amicus Br. 11. That contention is not properly before the Court. Under the Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809 (19 U.S.C. 3501 *et seq.*), "[n]o provision of the [GATT or the Antidumping Agreement], nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect," 19 U.S.C. 3512(a)(1), and "[n]o person other than the United States * * * may challenge * * * any action or inaction by any department, agency, or other instrumentality * * * on the ground that such action or inaction is inconsistent with such agreement," 19 U.S.C. 3512(c)(1). Thus, "[n]either the GATT nor any enabling international agreement outlining compliance therewith" can "trump[] domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress." *Corus Staal BV* v. *Department of Commerce*, 395 F.3d 1343, 1348 (Fed. Cir. 2005), cert. denied, 546 U.S. 1089 (2006).

In any event, respondents and their amicus do not explain how the international obligations they identify bear on the proper analysis in this case. Much like Section 1673, GATT and the Antidumping Agreement address the sale of goods, but provide no specific guidance for determining whether merchandise produced and transferred pursuant to SWU-type arrangements is "sold." Respondents' concern that reversal of the court

of appeals' decision will bring the United States into conflict with its international obligations is unfounded and provides no basis for sustaining the misguided decision below.

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,
*Petitioner*,

v.

EURODIF S.A., *ET AL.*,
*Respondents*.

USEC INC., *ET AL.*,
*Petitioners*,

v.

EURODIF S.A., *ET AL.*,
*Respondents*.

**On Writs of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF AMICUS CURIAE OF ALCOA, INC. IN SUPPORT OF RESPONDENTS

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IN THE

# Supreme Court of the United States

Nos. 07-1059 & 07-1078

UNITED STATES OF AMERICA,
*Petitioner,*

v.

EURODIF S.A., *ET AL.*,
*Respondents.*

USEC INC., *ET AL.*,
*Petitioners,*

v.

EURODIF S.A, *ET AL.*,
*Respondents.*

**On Writs of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF AMICUS CURIAE OF ALCOA, INC. IN SUPPORT OF RESPONDENTS

## STATEMENT OF INTEREST OF AMICUS CURIAE[1]

[1] Pursuant to Sup. Ct. R. 37.6, *amicus* notes that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief through consent letters filed with the Clerk's Office.

Alcoa Inc. ("Alcoa") is the world's leading producer of primary aluminum, fabricated aluminum and alumina. It serves customers in the defense, aerospace, construction, transportation, and industrial markets with aluminum products including structural materials, forgings, extrusions, castings, fastening systems, and electrical distribution systems for cars and trucks. Alcoa has 97,000 employees in 34 countries (28,000 in the United States) and was named one of the world's most sustainable corporations at the World Economic Forum in Davos, Switzerland.

The question presented in this case is of significant importance to Alcoa in two principal ways. The first is that this case involves the Court's first interpretation of the scope of the antidumping statute. As a global producer of aluminum and aluminum products, Alcoa is also a global consumer of numerous internationally traded products that are or may be subject to antidumping duties. Alcoa relies on key commodity imports to supply its U.S. operations and to maintain its competitive position. Alcoa thus has a keen interest in the Court's interpretation of international trade laws, including the antidumping statute.

This case also necessarily concerns issues that ultimately affect the cost of electricity in the United States—leading to Alcoa's second principal interest in this case. Alcoa is among the largest non-governmental consumers of electricity in the Nation, if not the largest. A decision of this Court in favor of petitioners—thereby permitting the Department of Commerce ("Commerce") to impose antidumping

duties on low enriched uranium imports from France regardless of whether the imports are "sold"—will increase the cost of electricity production at domestic nuclear power plants, adversely affecting Alcoa and its ability to remain competitive in the United States.

Alcoa has participated in antidumping proceedings before Commerce and the International Trade Commission ("ITC") involving imports of magnesium (as a producer and consumer) and aluminum metal (as a producer). *See, e.g.*, *Magnesium Metal from the Russian Federation*, 73 Fed. Reg. 52,642 (ITA Sept. 10, 2008); *Magnesium from China and Russia*, USITC Pub. 3763, Inv. Nos. 731-TA-1071 and 1072 (Final) (Apr. 15, 2005); *Aluminum Plate from South Africa*, USITC Pub. 3734, Inv., No. 731-TA-1056 (Final) (Nov. 26, 2004); *Certain Aluminum Plate From South Africa*, 69 Fed. Reg. 60,610 (ITA Oct. 12, 2004). In each of these proceedings, Alcoa has argued for the fair interpretation of the antidumping law and an accurate calculation of antidumping duties by Commerce.

Alcoa previously has filed briefs *amicus curiae* in cases before the Court affecting international trade regulation, *see United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), and American business generally, *see Gratz* v. *Bollinger*, 539 U.S. 244 (2003) (*amicus* brief of 65 Leading American Businesses); *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987) (*amicus* brief of ERISA Industry Committee).

## INTRODUCTION

The antidumping statute was enacted to respond to concerns that foreign companies would "dump" goods stockpiled during World War I into the United States market at prices so low that domestic industries could not compete. From its enactment in 1921 until the present, the fundamental purpose of the antidumping law has been to identify and remedy sales of foreign merchandise in the United States below their fair value. The statute, which defines dumping as "the sale or likely sale of goods at less than fair value," 19 U.S.C. 1677(34), makes that plain.

In this case, the domestic entity in the business of enriching uranium sought to impose an antidumping duty on *all* low enriched uranium ("LEU") entering the United States from France.[2] Imported LEU (uranium enriched in $U^{235}$), which is used as fuel for nuclear plants, enters the U.S. market in two ways. First, a utility may purchase LEU from another entity through what is known as an enriched uranium product contract, or EUP contract. An EUP contract involves "the sale or likely sale of goods"

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[2] LEU is necessary to fabricate nuclear fuel rods for use in nuclear reactors. The 5 steps involved in nuclear fuel production are: "(1) mining uranium ore; (2) milling and/or refining the ore into uranium concentrate, referred to as natural uranium ($U_3O_8$); (3) converting the natural uranium into uranium hexafluoride ($UF_6$), or 'feed uranium'; (4) enriching uranium hexafluoride to create low enriched uranium; and (5) using the low enriched uranium to fabricate nuclear fuel rods for use in nuclear reactors." U.S. Pet. App. 38a.

from one entity to another and could be subject to antidumping duties if that sale occurs "at less than fair value." 19 U.S.C. 1677(34). This case is not about EUP contracts.

The second way a utility may obtain LEU is to provide uranium "feed" from uranium ore or oxide to an entity that performs the service of separating the uranium feed into LEU and depleted uranium ("tails"). The utility pays the enricher based on the amount of energy needed to separate the feed into its enriched and depleted components. This energy expenditure is measured in "separative work units," or "SWUs." The contract for this separation process is accordingly referred to as a SWU (pronounced "swoo") contract. In a SWU contract, the contract only contemplates—and only includes consideration for—enrichment services.

This case is about whether a SWU contract for enrichment services supports the imposition of antidumping duties. The Court of International Trade and the Federal Circuit concluded that the antidumping statute unambiguously applies only to sales of goods, and not to the enrichment services provided under SWU contracts. This Court should affirm.

## SUMMARY OF ARGUMENT

Antidumping duties have been imposed on products ranging from ammonium nitrate to wooden bedroom furniture, including such varied products as magnesium, silicon, steel, ironing tables, pressure-sensitive plastic tape, top-of-the-stove stainless-steel cookware, and natural-bristle paint brushes. In the over eighty years of antidumping duties preceding

this case, no antidumping duty has ever been imposed without a sale or likely sale of merchandise in the United States.[3] Petitioners are asking this Court to do just that. They seek to expand—judicially, rather than legislatively—the reach of the antidumping law to include enrichment services contracts.

This sort of expansion of the antidumping law would be contrary to the plain and ordinary meaning of the statute's terms—which require that "merchandise" be "sold," *i.e.*, that title to a good be transferred for consideration, before an antidumping duty can attach. Courts have regularly recognized that "sales" are a common event and that use of the word "sale" in a statute indicates the ordinary, everyday meaning of the word. And unlike other international trade statutes, the antidumping law requires *sales*, not just imports, to trigger the remedies it offers.

Antidumping duties are designed to provide relief to domestic industries injured by international price discrimination. This narrowly focused statute does not make it illegal to dump goods; rather, it subjects the goods to a duty "sufficient to equalize competitive conditions." 42 A.L.R. Fed. 821 (citing *C.J. Tower & Sons* v. *United States*, 21 C.C.P.A. 416, 71 F.2d 438 (1934)). The key requirement in imposing this duty

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[3] For a complete list of products on which antidumping duties are in place (238 as of September 10, 2008), *see* http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/antidump_countervailing/index.htm. Commerce case numbers beginning with "A" or "AA" involve antidumping orders.

is that there be a sale of a good in the United States for less than fair value. That has been the scope of the statute for 87 years, and it should remain the scope now.

Petitioners sound a false alarm by arguing that their interpretation is necessary to correct a perceived "loophole" in the statute. It is not and has never been the task of the judiciary to re-write a statute. Congress is quite capable of remedying any statutory "loophole" it perceives needs correcting—and it has done so before in the antidumping statute. The practical realities of doing business in the global market also rebut petitioners' concern that global industries will rush to exploit any "loophole" left by the lower court's straightforward statutory interpretation. And there are statutes other than the narrowly targeted antidumping law at issue here that remain available to entities threatened with competitive injury from service contracts.

## ARGUMENT

### I. THE ANTIDUMPING STATUTE IS UNAMBIGUOUS.

#### A. The Federal Circuit And The Court Of International Trade Properly Terminated Their Inquiries At The First *Chevron* Step.

##### 1. The ordinary meaning of the words "merchandise * * * sold" is clear.

In *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court announced a two-step framework for evaluating

whether an agency's interpretation of a statute is lawful. The first step asks whether the statute "unambiguously expressed" the intent of Congress. *Id.* at 843. At this threshold inquiry, "[i]f, by 'employing traditional tools of statutory construction,' [the Court] determine[s] that Congress' intent is clear, 'that is the end of the matter.'" *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 457 (1998) (quoting *Chevron*, 467 U.S. at 842, 843 n.9). That is because "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9. It is only "if the statute is silent or ambiguous with respect to the specific issue" that courts proceed to analyze whether the agency's construction of the statute is reasonable. *Id.*; *see also FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

Both the Court of International Trade and the Federal Circuit determined that Congress had unambiguously expressed its intent that antidumping duties apply only to sales of goods—not to contracts for services. Neither court therefore found it necessary to reach the second step of the *Chevron* framework. Both courts were correct to stop at step one.

Congress unambiguously expressed its intent that the antidumping statute apply when "foreign *merchandise* is being, or is likely to be *sold*" in the United States at less than its fair value. 19 U.S.C. § 1673 (emphases added). "Dumping" involves, according to Congress, "sales or likely sales of goods." *Id.* at 1677(34). Despite this clear language, petitioners and their *amicus* Committee to Support

U.S. Trade Laws ("CSUSTL") would prefer the Court bypass the first *Chevron* inquiry and proceed straight to the sheltering deference built into the second step of the analysis.[4] But neither the term "merchandise" nor the term "sold" is unclear, nor indeed do petitioners or their *amicus* offer any ambiguity. Instead, they simply assert that the Judiciary should simply defer to Commerce and grant it discretion to interpret the "merchandise * * * sold" prerequisite to imposition of antidumping duties as encompassing contracts for enrichment services.

But Commerce only obtains this sort of law-making discretion where the terms of the statute are ambiguous. It is not the function of the Executive—or the Judiciary—"to engraft on a statute additions which [it] think[s] the legislature logically might or should have made." *United States* v. *Cooper Corp.*, 312 U.S. 600, 605 (1941). Instead, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the

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[4] The United States claims it is "undisputed" that the antidumping statute does not speak directly to the precise question at issue here. U.S. Br. 23. The antidumping statute does not speak specifically to contracts for uranium enrichment services; that much is true. But as both the Federal Circuit and the Court of International Trade correctly held, the antidumping statute applies unambiguously only to contracts for the sale of goods. U.S. Pet. App. 11a. And both courts also correctly rejected Commerce's effort to re-cast enrichment services contracts as contracts for the sale of goods. U.S. Pet. App. 12a, 17a, 33a-34a.

legislative purpose." *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (quoting *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). *See also Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (emphasizing that the "ordinary meaning" of terms used by Congress indicates congressional intent). In construing the antidumping law, like any other law, "resort may not be had to extraneous matters to create an ambiguity in the language of the statute where none otherwise exists." *C.J. Tower & Sons* v. *United States*, 46 C.C.P.A. 36, 38, 1958 WL 7342 (1958) (interpreting antidumping law according to ordinary meaning).

The ordinary meaning of "merchandise" that is "sold" is plain on its face; it leaves no gap for Commerce to fill. "Merchandise" is a tangible good or ware. *See Black's Law Dictionary* 986 (6th ed. 1990) (defining merchandise as "[a]ll goods which merchants usually buy or sell, whether at wholesale or retail; wares and commodities such as are ordinarily the objects of trade and commerce"); *Webster's Third New Int'l Dictionary Unabridged* 1413 (2002) (defining "merchandise" as "the commodities or goods that are bought and sold in business: the wares of commerce). And to involve a "sale" of merchandise, there must be a seller who pays a buyer a sum of money (consideration), in exchange for which the seller "transfers title" to the goods to the buyer. *Black's Law Dictionary*, *supra*, at 1337; *accord Webster's Third New Int'l Dictionary Unabridged*, *supra*, at 2003 (defining "sale" as "a contract transferring the absolute or general

ownership of property from one person or corporate body to another for a price").

As this Court made clear over 150 years ago, "[s]ale is a word of precise legal import" that "means a contract between parties to take and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold." *Williamson* v. *Berry*, 49 U.S. 495, 496 (1850); *see also Butler* v. *Thomson*, 92 U.S. 412, 415 (1875) ("The essential idea of a sale is that of an agreement or meeting of minds by which a title passes from one, and vests in another.").[5]

### 2. The statutory language restricts application of antidumping duties to "merchandise" "sold" or "likely to be sold" in the United States.

Congress chose not to enact an antidumping statute that applies to every import that reaches our Nation's shores. The law it passed requires a sale of merchandise. 19 U.S.C. § 1673. As a result, transactions other than sales of goods cannot trigger antidumping duties. Those involving, for example,

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[5] *Amicus* CSUSTL admits that "technical[ly]" there was not a sale of goods—because there was no transfer of title—but suggests that the Court ignore this "technical[ity]" and permit antidumping duties anyway. CSUSTL Br. 4; *see also* U.S. Pet. App. 33a (petitioners "concede that a sale of goods requires a transfer of ownership"). But Congress did not treat the existence (or lack thereof) of a sale of goods as a technicality. Absent a sale or likely sale of foreign merchandise in the United States, a transaction is outside the bounds of the antidumping law.

"a conveyance for a limited and restricted use" fall short of being sales of merchandise. *J.H. Cottman & Co.* v. *United States*, 20 C.C.P.A. 344, 356 (1932) (applying "ordinary meaning" of sales in antidumping law). Giving away free samples also does not trigger the statute. *NSK Ltd.* v. *United States*, 115 F.3d 965, 974 (Fed. Cir. 1997) (rejecting the government's argument that ordinary meaning of "sales" did not require consideration). Commerce itself recognized in *NSK* the unambiguous parameters of the word Congress chose to employ: In *NSK*, Commerce asserted a "long-standing policy" of considering a transaction a "sale" for purposes of a dumping analysis where an ownership transfer occurs. *Id.* at 972.

Recognizing this fact, petitioners and their *amicus* ask the Court somehow to discern between the lines that the parties *really* were contracting for the sale of goods. But the plain terms of the SWU contracts—and in particular, the clear intent that the utility maintain title to the uranium feed at all times—defeat any such interpretation. U.S. Pet. App. 20a. Under the contracts, the enricher's obligation is to provide a service—separating the uranium feed into enriched and depleted uranium.[6] The utility's obligation is to provide uranium feed and pay for the SWUs necessary to complete the

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[6] That actual title remains "at all times with the utility" is demonstrated by the facts that the enricher does not "have the power to sell a utility's feedstock to a third party" and the feed "does not become an asset of the enricher, nor is it ever reflected as such on the enricher's books and records." U.S. Pet. App. 40a-41a.

separation; the utility then receives back enriched and depleted uranium. *Id.* 45a. Payment under a SWU contract is based on the quantity and value of those separative work units—the service—not the LEU itself.[7] The lengths to which Commerce had to go to construct a "sales" price "begs the question whether these transactions can truly be construed as relevant sales of merchandise." *Id.*

### 3. Nothing in the history of the antidumping law suggests that "sold" has a special meaning in the statute.

Since the original enactment of the Antidumping Act of 1921, the statute has consistently applied to "foreign merchandise" that "is being sold or is likely to be sold in the United States." Antidumping Act of 1921, § 201, *codified at* 19 U.S.C. § 160.[8] From that

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[7] Under Commerce's (now withdrawn) tolling regulation addressing contractors and subcontractors (formerly 19 C.F.R. 351.401(h)), Commerce policy dictated that where the price paid includes only the value added by the services performed, and not the entire value of the merchandise, "there is no cognizable sale under the antidumping duty law." U.S. Pet. App. 205a-206a.

[8] Nothing in the amendments to the antidumping law in 1954, 1958, 1968, or 1975 altered this language. *See* Pub. L. No. 83-768, § 301, 68 Stat. 1138 (1954); Pub. L. No. 85-630, Sec. 1, 72 Stat. 583, 585 (1958); Pub. L. No. 90-634, § 201, Oct. 24, 1968, 82 Stat. 1347 (1968); Pub. L. No. 93-618, Sec. 321(a), 88 Stat. 2043 (1975). And in 1979, when the Antidumping Act of 1921 was repealed and replaced, the statute continued to apply only where "foreign merchandise is being, or is likely to be, sold in the United States." Pub. L. No. 96-39, Title I, § 101, 93 Stat. 162 (1979), *codified at* 19 U.S.C. § 1673.

time, the concern has consistently been "to prevent the stifling of domestic industries by the dumping of foreign merchandise upon the American market at less than its fair value in the country of production." H.R. Rep. No. 66-479 (1919) at 1; *id.* at 2-3 (pointing to specific products being sold at low prices in the United States by German producers). Antidumping duties are thus imposed "to offset the amount of the difference between the fair value of the merchandise and the price for which it is sold in the United States, *i.e.*, the dumping margin." S. Rep. No. 96-249 (1979) at 37; *see also id.* at 61 (same). This formula has not changed since 1921.

Nothing in the antidumping law suggests that Congress meant to imbue the term merchandise "sold" with any special meaning. And nothing in the statute's history justifies an inference that contracts for the provision of services could be considered contracts for the sale of goods. U.S. Pet. App. 23a.

In the context of leasing agreements, however, Congress *has* expanded the reach of the antidumping law. In 1984, Congress recognized that when merchandise was imported through a leasing agreement, it was not subject to antidumping duties under the then-current statute—because a lease is not a "sale" of foreign merchandise. H.R. Rep. No. 98-725 (1984) at 11. Congress accordingly determined that when lease agreements were used to accomplish "what are in effect transfers of ownership," the transaction should be subject to antidumping duties. *Id.* Congress amended the statute to provide explicitly that "sales" would include leases of merchandise that are "tantamount" and "equivalent" to sales. *Id.* Section 1673 now

expressly advises that "a sale of foreign merchandise includes the entering into of any leasing arrangement regarding that merchandise that is equivalent to the sale of that merchandise." 19 U.S.C. § 1673(2).[9]

Congress also provided explicit guidance on when leasing arrangements were to be subject to the antidumping statute by identifying six factors Commerce "shall consider" in assessing whether a given lease of a product is equivalent to a sale of that product. *See* 19 U.S.C. § 1677(19) (enacted 1988). The lease-equivalent-to-sale amendment was designed to solve a particular problem—transactions where "capital goods, such as airplanes, heavy electrical equipment, machine tools, construction equipment, and other 'big ticket' items" were being "leased" rather than bought. H.R. Rep. No. 100-576 (1988) at 615; *id.* at 616 (noting that amendment would cover "leases of the type used in international leasing of commercial aircraft by companies such as Airbus Industrie").

Petitioners point to Congress's enactment of the lease-equivalent-to-sale amendment as *support* for their position. U.S. Br. 30-32; USEC Br. 33, 52. Quite the contrary: the 1984 amendment confirms

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[9] Petitioners rely heavily on cases holding that leases can sometimes be equivalent to sales. U.S. Br. 29 (citing *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965) and *Gray* v. *Powell*, 314 U.S. 402 (1941)); USEC Br. 31, 35 (citing same); CSUSTL Br. 11 (citing same). But these cases have no relevance here, because Congress has not stated that *services* can be "equivalent to sales" of goods in the antidumping context.

that when Congress wishes to change the scope of the antidumping statute to encompass a transaction not commonly thought to be a "sale," Congress knows how to do it.

Congress has not made similar legislative adjustments with regard to contracts for *services*. This Court should not "by implication" extend the statute's exceptions beyond those specifically identified by the legislature. *Helvering* v. *William Flaccus Oak Leather Co.*, 313 U.S. 247, 251 (1941); *see also Commissioner* v. *Starr Bros.*, 204 F.2d 673, 674-675 (2d Cir. 1953) (explaining, in the tax code context, that "[w]hen Congress has wished to tax as capital gains receipts which would not fall within the ordinary meaning of 'sale or exchange' of assets, it has dealt specifically with such transactions").

### B. Other Statutes Involving Sales Of Goods Have Been Interpreted In Line With The Ordinary Meaning Of Those Terms.

A variety of statutes dealing with international trade apply to "sales" and other types of movement of goods in international commerce. The word "sale" in the antidumping and other international trade statutes has consistently been held to invoke the ordinary meaning of the term. *See, e.g.*, *Enercon GmbH* v. *International Trade Comm'n*, 151 F.3d 1376, 1381-82 (Fed. Cir. 1998) (interpreting Section 337 of the Tariff Act, 19 U.S.C. § 1337, and concluding that where the term "sale" is not defined, "Congress intended to give the term its ordinary meaning"); *VWP of Am., Inc.* v. *United States*, 175 F.3d 1327, 1339 (Fed. Cir. 1999) ("in order for merchandise to be 'sold' for purposes of [the Customs

valuation statute], there must be a transfer of title from one party to another for consideration"); *Wood* v. *United States*, 62 C.C.P.A. 25, 33, 505 F.2d 1400, 1406 (1974) (examining "export value" under former Customs valuation statute and giving the term "sale" its ordinary meaning).

In the antitrust context, the Robinson Patman Act, like the antidumping statute, applies only where "commodities are sold * * * within the United States." 15 U.S.C. § 13(a). Because the statute is limited by its terms to price discrimination in the sale of "commodities," it has been held inapplicable to transactions involving services—which courts consistently find do not fall within the ordinary understanding of "sales" of "commodities." *See, e.g.*, *Metro Comm'ns Co.* v. *Ameritech Mobile Comm'ns, Inc.*, 984 F.2d 739 (6th Cir. 1993) (cellular telephone services); *Freeman* v. *Chicago Title & Trust Co.*, 505 F.2d 527 (7th Cir. 1974) (title insurance); *Tri-State Broad. Co.* v. *United Press Int'l, Inc.*, 369 F.2d 268 (5th Cir. 1966) (news information service); *Standfacts Credit Servs., Inc.* v. *Experian Info. Solutions, Inc.*, 405 F. Supp. 2d 1141, 1156 (C.D. Cal. 2005) (credit reports); *Berlyn, Inc.* v. *The Gazette Newspapers, Inc.*, 157 F. Supp. 2d 609, 621 (D. Md. 2001) (newspaper advertising); *TV Comm'ns Network, Inc.* v. *ESPN, Inc.*, 767 F. Supp. 1062, 1076 (D. Colo. 1991) (cable service), *aff'd*, 964 F.2d 1022 (10th Cir. 1992); *SCM Corp.* v. *Xerox Corp.*, 394 F. Supp. 384 (D. Conn. 1975) (photocopying).

So too under Section 3 of the Clayton Act, which applies to a "lease or * * * a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities." 15 U.S.C. § 14. Section 3 has

been found inapplicable where the contract is for a sale of services rather than goods. *See, e.g., Hudson Valley Asbestos Corp.* v. *Tougher Heating & Plumbing Co.*, 510 F.2d 1140, 1145 (2d Cir. 1975) (insulation services). A contract for a license to manufacture a good similarly is not sufficient to come within the terms of Section 3. *See, e.g., Linzer Prods. Corp.* v. *Sekar*, 499 F. Supp. 2d 540, 556 (S.D.N.Y. 2007); *Tele Atlas N.V.* v. *Navteq Corp.*, 397 F. Supp. 2d 1184, 1192 (N.D. Cal. 2005).

In the tax context, the term "sale" has regularly been interpreted as incorporating the ordinary definition of a "sale." This Court has reasoned that because a sale is a "common event in the non-tax world," where the term "sale" is used in the tax code "without limiting definition and without legislative history indicating a contrary result, its common and ordinary meaning should at least be persuasive of its meaning as used in the Internal Revenue Code." *Commissioner* v. *Brown*, 380 U.S. 563, 570-571 (1965). *See also United States* v. *Seattle-First Nat'l Bank*, 321 U.S. 583, 590 (1944) (applying ordinary meaning to word "sold" in the Revenue Act of 1926); *Helvering*, 313 U.S. at 249 (holding that term "sale" in Revenue Act of 1934 should be given its ordinary meaning and that "demolition of property and subsequent compensation for its loss by an insurance company" does not fall within that meaning); *United States* v. *King*, 1995 WL 32620, at *2 (4th Cir. Jan. 30, 1995) (applying ordinary meaning to word "sold" in tax credit provision of Internal Revenue Code).[10]

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[10] Courts likewise apply the ordinary meaning to the term "merchandise" in the tax code. *See Wilkinson-Beane,*

The Patent Act also uses the term "sells," in setting out the scope of infringing activity. *See* 35 U.S.C. 271(a) ("whoever without authority * * * sells any patented invention[ ] within the United States * * * infringes the patent"). Courts again confer on the word "sell" as used in that Act the ordinary understanding of that term. *See NTP, Inc.* v. *Research In Motion, Ltd.*, 418 F.3d 1282, 1319 (Fed. Cir. 2005); *Fellowes, Inc.* v. *Michilin Prosperity Co., Ltd.*, 491 F. Supp. 2d 571, 577 (E.D. Va. 2007).

Finally, under the Uniform Commercial Code ("UCC"), a sale "consists in the passing of title from the seller to the buyer for a price." U.C.C. § 2-106. The UCC applies only to sales of goods. *Id.* § 2-102. And the UCC has twice been held specifically inapplicable to SWU contracts—on the *government's* argument that *SWU contracts do not involve a sale of goods*. In *Barseback Kraft AB* v. *United States*, 36 Fed. Cl. 691, 705 (1996), *aff'd*, 121 F.3d 1475 (Fed. Cir. 1997), the Federal Government took the position that SWU contracts were for services, not for goods, based on both the form of the transaction—"Under the contracts, the individual utilities supply the USEC with the uranium. The USEC then enriches

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*Inc.* v. *Commissioner*, 420 F.2d 352, 354 (1st Cir. 1970) ("In construing the word 'merchandise' we apply the rule that 'the natural and ordinary meaning of the words used will be applied (in construing tax statutes) unless the Congress has definitely indicated an intention that they should be otherwise construed * * *.'") (quotation omitted). This ordinary definition includes "'goods purchased in condition for sale,' 'goods awaiting sale,' 'articles of commerce held for sale,' and 'all classes of commodities held for sale.'" *Id.*

the uranium and returns to the customer uranium enriched to the customer's specifications."—and the substance of the transaction—"The price paid by the customer is based on the number of SWUs required to enrich the uranium to the customer's specifications." *Id.* In form and substance, "[i]t is clear, then, from the process itself, that the customers are contracting for services, not goods, from the USEC." *Id.* So too in *Centerior Serv. Co.* v. *United States*, No. 95-103c, 1997 U.S. Claims LEXIS 323, at *19 (Fed. Cl. Dec. 29, 1997) (SWU contracts "are for uranium enrichment services," not contracts for goods governed by the UCC). Simply put, if a SWU contract is not a contract for the sale of a good under the UCC, neither is it one for "merchandise * * * sold" under the antidumping statute.[11]

All of these statutes arise from and are applied in different contexts; yet each makes clear that "the common, or usual meaning of the term sale includes those situations in which a contract has been made between two parties who agree to transfer title and possession of specific property for a price." *Enercon GmbH* v. *International Trade Comm'n*, 151 F.3d 1376, 1381-82 (Fed. Cir. 1998).

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[11] The Government's consistent position, until this case, has been that SWU contracts involve services, not sales. In *Florida Power & Light Co.* v. *United States*, 307 F.3d 1364, 1372 (Fed. Cir. 2002), the United States argued that SWU contracts involved no "disposal of property," and thus were outside the jurisdiction of the Contracts Dispute Act. The court agreed, emphasizing that "the nature of the contractual pricing scheme" persuasively shows that "the transaction is properly characterized as a service rather than a sale." *Id.* at 1373.

### C. Other International Trade Statutes Expressly Apply To *Imported* Merchandise, Whether Or Not *Sold*.

Congress limited the scope of the antidumping law to "merchandise * * * sold" in the United States, but it has given a different scope to other international trade statutes, for example expressly authorizing their application to imports without regard to whether a "sale" of "merchandise" has occurred. The scope of these statutes amply demonstrates that Congress can capably differentiate among trade remedies triggered only by the sale of merchandise and trade remedies triggered by importation of goods even if not sold. *See* 2A N. Singer, Sutherland on Statutes and Statutory Construction § 46:06, at 194 (6th ed. 2000) ("The use of different terms within similar statutes generally implies that different meanings were intended"); *see also Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (applying this "usual rule" of statutory construction). No international trade statute other than the antidumping law uses the sale price of merchandise in the United States as the prerequisite to imposing a remedy.[12]

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[12] The antidumping statute requires a sale price for goods in the United States—known as the "export price" or "constructed export price"—because the antidumping duty must be calculated based on the difference between the price in the United States and the "normal value" of the goods.

### 1. The countervailing duty law—unlike the antidumping law—applies both to imports and sales of goods into the United States.

Countervailing duties seek to offset foreign subsidies that may give an unfair competitive advantage to foreign manufacturers, producers, or exporters over U.S. producers. *See* 19 U.S.C. § 1671. And in contrast to the antidumping law, Congress provided in the countervailing duty law that countervailing duties may be applied both to (1) merchandise "imported" into the United States,[13] and (2) merchandise "sold (or likely to be sold) for importation" into the United States. *See id.*; H.R. Comm. on Ways and Means, *Overview and Compilation of U.S. Trade Statutes*, Vol. 1, at 101 (2005 ed.); *see also* Trade Agreements Act of 1979, Report and Statement of Administrative Action, S. Rep. No. 96-249 at 43 (1979) (explaining revised countervailing duty law); S. Comm. on Finance, *Omnibus Tariffs and Trade Measures, Explanation of Provisions*, S. Rep. No. 98-219 at 22 (1979) (discussing addition of "sales or likely sales for importation" to statute which previously only applied to "imports").

The countervailing duty statute thus has a different scope from that of the antidumping statute—which is logical. The antidumping statute focuses on the selling prices of merchandise in the United States, while the countervailing duty statute

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[13] The word "import" has been defined by this Court as "articles brought into a country." *Brown* v. *Maryland*, 25 U.S. 419, 437 (1825).

focuses not on prices, but on the provision of subsidies by foreign governments with respect to imported goods.[14]

### 2. Section 337 of the Tariff Act applies to unfair methods of competition and unfair acts in the importation of goods *or* sale of goods after importation.

Section 337 of the Tariff Act of 1930 also applies to *imports or sales* of certain goods—rather than exclusively to sales of goods. *See* 19 U.S.C. § 1337(a)(1). The purpose of Section 337 is to prevent articles from being imported *or* sold into the United States in violation of intellectual property rights. It makes unlawful: (1) "[u]nfair methods of competition and unfair acts in the importation of articles * * * *or* in the sale of such articles" in the United States where a domestic industry exists or is being established, and (2) "[t]he importation into the United States, the sale for importation, *or* the sale within the United States after importation" of articles that infringe a valid and enforceable United States patent, copyright, trademark, or design right, or articles that are produced under a process covered by a valid and enforceable United States patent. *Id.* (emphases added).

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[14] The court of appeals held that the purchase of uranium enrichment services by the French government for greater than adequate remuneration was not subject to countervailing duties. U.S. Pet. App. 24a-27a; 19 U.S.C. § 1677(5)(E)(iv). Petitioners did not appeal this determination.

The express language of Section 337 again makes clear that where Congress intends to apply a trade remedy statute to imports into the United States—and not only to "sales" of merchandise in the United States—it knows the words to use.

### 3. The "safeguard," or "escape clause," statute in the Trade Act of 1974 likewise applies to imports without regard to whether they are sold.

A third relevant trade remedy statute is the "safeguard" or "escape clause" statute. *See* 19 U.S.C. §§ 2251-54. Enacted in the Trade of Act of 1974, the statute is designed "to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition, and to assist industries, firm[s], workers, and communities to adjust to changes in international trade flows." *Id.* § 2102(4). Under this statute, if the ITC determines that "an article is *being imported into the United States* in such increased quantities" as to be a "substantial cause of serious injury" to the domestic industry producing a "like or directly competitive" article, then the President of the United States may act to protect the injured domestic industries. *Id.* § 2251(a) (emphasis added). The statute is thus "the answer to complaints from the United States Congress about the effects of liberalized trade." Raj Bhala, *Modern GATT Law: A Treatise on the General Agreements on Tariffs and Trade* 940 (2005). *See generally* Thomas P. Maltese, *Congress's Causation Conundrum: Rethinking the United States's*

*Approach to Escape Clause Actions*, 17 Kan. J.L. & Pub. Pol'y 520, 526 (2008).[15]

Again unlike the antidumping law, Congress specified that the safeguard statute applies to imports with no requirement that there be sales (or likely sales) of merchandise in the United States. The key inquiry is whether "an article is being *imported into the United States*" so as to cause or threaten serious injury to a domestic industry that produces competing articles. 19 U.S.C. § 2252(b) (emphasis added). Congress therefore intended the safeguard law to provide relief from injury caused by imports into the United States, without any requirement that there to be a sale of merchandise in the United States.

**4. Section 421 applies to increased imports of Chinese-origin products.**

In 2000, Congress enacted a trade statute that provides a remedy for domestic producers and manufacturers faced with increased imports of goods from China. This statute too is intended to authorize restrictions on *imports*—without regard to whether they are "sold" in the United States, if the ITC concludes that "market disruption" causes or threatens "material injury" to a domestic industry making competing products. *See* Section 421 of the Trade Act of 1974, as added by the Act of Oct. 10,

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[15] Another provision of the Trade Act of 1974 provides assistance to U.S. workers who can demonstrate that increases of *imports* of articles competitive with articles produced by the workers' firm—without regard to sales of those imports—contributed to the loss of their jobs. *See* 19 U.S.C. § 2272(a)(2)(A).

2000, Pub. L. No. 106-286, § 103(a)(3), 114 Stat. 882, *codified at* 19 U.S.C. § 2451. Section 421 thus is intended to address injury from imports, whether or not they are sold.

Section 421, like the safeguard statute referred to above, requires investigation by the ITC into whether imports cause or threaten "injury" to a domestic industry. 19 U.S.C. § 2451(b)(1). Under both statutes, the President makes the final decision whether to provide a remedy, after an affirmative "injury" determination by the ITC.

## II. PETITIONERS' "LOOPHOLE" ARGUMENTS ARE IRRELEVANT AND OVERBLOWN.

### A. The Result Of A *Chevron* Analysis Does Not Change Because Of A Purported "Loophole."

Petitioners and *amicus* CSUSTL urge the Court to rewrite the statute to avoid what they see as a "loophole" left by Congress that they believe should be closed. U.S. Br. 18, 34; USEC Br. 23-24; CSUSTL Br. 4. That is not how statutory interpretation works. Neither the Commerce Department nor the courts are permitted to re-write unambiguous language in a statute. *See Lamie* v. *U.S. Trustee*, 540 U.S. 526, 538 (2004) (rejecting argument that would have resulted in the "enlargement" rather than "construction" of a statute "so that what was omitted * * * may be included within its scope") (quoting *Iselin* v. *United States*, 270 U.S. 245, 251 (1926)). "[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have

failed to do." *United States* v. *Locke*, 471 U.S. 84, 95 (1985). Courts are not "licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result." *Id.*

Nor is there any precedent for allowing a party to invoke the possibility of a "loophole" as a reason to override the canon that, absent an indication by Congress to the contrary, Congress intends the words in its enactments to carry their common meaning. *See National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 110 n.5 (2002); *Walters* v. *Metropolitan Educ. Enters., Inc.*, 519 U.S. 202 (1997); *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993). Here, the statute unambiguously provides that only sales of "merchandise" and leases "equivalent" to sales of "merchandise" are subject to antidumping duties. In enacting the leasing provision, Congress confirmed that it can and will remedy a "loophole" it concludes needs closing. *See Lamie*, 540 U.S. at 538 (expressing the Court's "unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding").

### B. Petitioners' "Loophole" Argument Ignores The Global Market's Practical Realities.

Petitioners and CSUSTL also contend that if the Court upholds the Federal Circuit's conclusion that the ordinary meaning of "merchandise * * * sold" does not include the provision of enrichment services, foreign producers around the globe will rapidly restructure their contracts with U.S. purchasers to

take advantage of the purported "loophole" in the statute. As we already have explained, this sort of scarifying does not alter the straightforward *Chevron* step-one analysis the Federal Circuit and the Court of International Trade properly employed here. Petitioners' rhetoric also ignores the practical realities of operating in the global market. Global companies and industries simply are not likely to overhaul their contracting practices merely for the dubious benefit of a seeming "loophole" in one country's antidumping law.

The example of the uranium enrichment industry itself is instructive. One of the principal differences between SWU contracts and EUP contracts has to do with which party must obtain, transport, and provide uranium feed over the duration of the contract.[16] In an EUP contract, the enricher bears the risk of price fluctuations for feed material; in a SWU contract, that risk is borne by the utility. Who bears the risk of feed price is no trifling detail; "[u]ranium prices are very volatile." GAO Report 08-606R, *Nuclear Material: DOE Has Several Potential Options for Dealing with Depleted Uranium Tails, Each of Which Could Benefit the Government* at 8 (Mar. 31, 2008) ("GAO Report 08-606R"). Uranium prices increased more than seventeenfold over the past several years, from $21 per kilogram in November 2000 to $360 per kilogram in mid-2007, before declining to $200 per kilogram in February 2008. *Id.* at 1, 8.

Another practical reality of the global market is that whichever party has title to the raw materials

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[16] The average contract duration in this case is 5 years. Eurodif Br. 9.

generally determines who pays taxes on those materials and how the materials are carried on a company's books. U.S. Pet. App. 41a.; *see also* U.S. Pet. App. 185a ("USEC has required its utility customers to pay all property tax on what it views, correctly, as the 'customer's feed.'"). In this case, for example, the record demonstrates that enrichers do not recognize the uranium feed—to which the utility maintains title—as an asset on their books. U.S. Pet. App. 185a.

The particular contractual arrangement two parties select also determines which of them bears the risk for other supply chain constraints, labor shortages, strikes, equipment costs, financing and capital investments, transportation costs, liability costs, insurance, and disposal of remnant materials like scrap or defective parts. To obtain LEU, for example, uranium feed is separated into LEU and tails. The type of contractual arrangement determines which party faces the risks and benefits of dealing with the tails. U.S. Pet. App. 21a (SWU contracts typically grant rights to utilities over depleted uranium tails). On the one hand, tails are expensive to store and maintain. *See* GAO Rep. 08-606R at 7 (tails owned by the Department of Energy cost $4 million annually to store and maintain). But tails can also be re-enriched and sold as either natural or enriched uranium. U.S. Pet. App. 231a. Depending on the price of uranium, the contractual right to the tails offered by a SWU contract can be of significant value. *See* GAO Rep. 08-606R at 1, 3, 4 (estimating the value of the Department of Energy's tails at $7.6 billion based on Feb. 2008 uranium price; given the price fluctuations of uranium over

the past eight years, the value could range "from nothing to more than $20 billion"); Ux Weekly, Apr. 7, 2008, Vol. 22, issue 14, at 5, *available at* http://www.uxc.com/products/UxW22-14.pdf (USEC contending that re-enriching most of the Department of Energy's high-assay tails between 2008-2021 could create up to $8 billion for the U.S. Treasury).

Even if "loophole exploitation" were an appropriate consideration for the Court, therefore, the many practical and financial implications of altering contractual arrangements refute petitioners' speculation that reading the antidumping law by its plain terms will result in a major shift in contracting practices.

## III. PUBLIC POLICY AND OTHER AVAILABLE TRADE AND COMPETITION LAWS SUPPORT THE LOWER COURTS' CONSTRUCTION OF THE ANTIDUMPING LAW.

Congress intended the antidumping law to remedy a specific problem: international price discrimination in the sale of goods. Expanding the scope of the antidumping law as petitioners urge would harm significant domestic constituencies and interests not currently represented or considered in antidumping proceedings. And other trade and competition laws are available to remedy injuries to domestic industries.

### A. The Antidumping Law Focuses On Preventing Harm To Domestic Producers From Sales Of Low-Priced Goods.

Petitioners' *amicus* CSUSTL asserts that the Court should give the antidumping statute a "broad reading" because it has a "remedial purpose." CSUSTL Br. 19. This suggestion fails to acknowledge that the antidumping law is intended to provide remedial relief to domestic producers and manufacturers only under specifically limited circumstances.

To begin with, not all sales of goods at less than fair value are subject to antidumping duties. For example, before antidumping duties may be imposed, the Commission typically must determine that "an industry in the United States * * * is materially injured, or * * * is threatened with material injury." 19 U.S.C. § 1673(2)(A). The term "industry" in the antidumping law is limited to "*producers* as a [w]hole of a *domestic like product*, or those *producers* whose collective output of a domestic like product constitutes a major proportion of the domestic like production of the product." *Id.* § 1677(4)(A) (emphases added).

The antidumping law accordingly is concerned with protecting U.S. producers that are injured or threatened with material injury from sales of subject merchandise in the United States; it is not concerned with the impact of antidumping duties on consumers or industrial users of this merchandise. *See Withdrawal of Regulations Governing the Treatment of Subcontractors ("Tolling" Operations)*, 73 Fed.

Reg. 16,517, 16,517 (Mar. 28, 2008) ("the Department's statutory mandate" is "to provide relief to *domestic industries* suffering material injury") (emphasis added).

In addition, and unlike most trade and competition statutes,[17] the antidumping law does not permit consideration of the interests of other affected U.S. constituencies such as U.S. workers (including, for example, Alcoa's 28,000 U.S. employees) and manufacturers that require access on competitive terms to imported raw materials. Harm caused by antidumping duties to downstream users and consumers of imported materials, including Alcoa, is not considered in determining whether to impose antidumping duties. *See, e.g., Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam*, USITC Pub. 3748, Inv. Nos. 731-TA-1063-1068 (Final) at 55 (Jan. 2005) (Commissioner Pearson, dissenting) (discussing harm to U.S. consumers from imposing antidumping duty but recognizing that the antidumping laws "do not permit the Commission to consider [consumer] issues in making injury determinations in an antidumping investigation").

The fact that the interests of downstream users and consumers are left out of the antidumping injury analysis reinforces that the statute's specifications must be construed as written and no further. And one of those specifications is that duties may only be assessed on merchandise sold in the United States.

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[17] *See* 19 U.S.C. § 1337 (intellectual property); 19 U.S.C. § 2251 (safeguards); 19 U.S.C. § 2451 (China safeguard).

The antidumping law relatedly does not provide procedural protection to downstream users and U.S. consumers even though they can be negatively affected by antidumping duties. The Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, does not apply to antidumping hearings, *see* 19 U.S.C. § 1677c(b), and antidumping proceedings are characterized as investigatory rather than adjudicatory. *See, e.g.*, *Avesta AB* v. *United States*, 689 F. Supp. 1173, 1189 (Ct. Int'l Trade 1988).[18] Further, because downstream users and consumers of imported materials are not "interested parties" in antidumping proceedings (*see* 19 U.S.C. § 1677(9)), they cannot access confidential business information critical to the ITC's and Commerce's proceedings. 19 U.S.C. § 1677f(c)(1). Nor can they appeal adverse final dumping determinations. 19 U.S.C. § 1516a(a)(1), (2). *See, e.g.*, *Withdrawal of Tolling Regulations*, 73 Fed. Reg. at 16,517 ("Purchasers of subject merchandise do not qualify as interested parties under [§ 1677(9)]. Purchasers who have obtained the status of 'foreign producers' under the [tolling] regulation, however, become interested parties in error."). That the antidumping law does not provide procedural protections to affected users and consumers reinforces that this law homes in on a particular harm—injuries to U.S. producers from sales of underpriced goods—and offers a particular remedy. It should not be expanded beyond that carefully delineated purpose.

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[18] There are no rights of apprisal, cross-examination, confrontation, or discovery in antidumping proceedings. *Id.*; *Budd Co. Ry. Div.* v. *United States*, 507 F. Supp. 997, 1001 (Ct. Int'l Trade 1980).

### B. Anticompetitive Activities Outside The Scope Of The Antidumping Law Remain Subject To Other Trade and Competition Laws.

CSUSTL claims that the antidumping law is "the only defense available to U.S. manufacturers against unfairly traded imports," leaving manufacturers "no recourse" in the event of an affirmance here. CSUSTL Br. 22. That simply is not so. Numerous statutes protect competition, prohibit predatory pricing, and forbid unlawful restraints on trade, even when the injury is from abroad. The Sherman Act, as amended by the Foreign Trade Antitrust Improvements Act of 1982, applies to conduct involving trade or commerce that has a "direct substantial, and reasonably foreseeable" effect on domestic commerce or U.S. import trade that "gives rise to a [Sherman Act] claim." 15 U.S.C. § 6a; *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993) (holding that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."). The Federal Trade Commission Act, the Clayton Act, and the Robinson Patman Act also protect against certain competitive injuries from abroad. *See* II *Antitrust Law Developments*, 1185-86 (6th ed. 2007) (citing cases); *see also Antitrust Enforcement Guidelines for International Operations*, U.S. Dep't of Justice and Federal Trade Commission (Apr. 1995), available at http://www.usdoj.gov/atr/public/guidelines/internat.htm (describing how "[f]oreign commerce cases can involve almost any provision of the antitrust laws"

and providing illustrative examples under numerous antitrust laws).

Other international trade statutes address increased imports, unfair practices, and violations of trade agreements; they also remain available to injured domestic producers. *See supra* at 21-26. These other statutes, as we have explained, provide various forms of protection against anticompetitive actions and unfair trade practices. The antidumping statute, for its part, has never been brought to bear against services like those at issue here. The antidumping law focuses on the prices of goods sold in the United States. It is not a broad panacea, and it should be applied—as Congress intended—only where "the sale or likely sale of goods at less than fair value" has taken place. 19 U.S.C. § 1677(34).

## CONCLUSION

For the foregoing reasons, as well as those in respondents' briefs, the Federal Circuit's decision should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

*v.*

EURODIF S.A.,

*Respondent.*

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USEC INC. and
UNITED STATES ENRICHMENT CORPORATION,

*Petitioners,*

*v.*

EURODIF S.A.; COMPAGNIE GENERALE DES MATIERES NUCLEAIRES; COGEMA, INC.; AD HOC UTILITIES GROUP; and UNITED STATES,

*Respondents.*

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**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

## BRIEF OF THE COMMITTEE TO SUPPORT U.S. TRADE LAWS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICI CURIAE*

The *Amici Curiae* in support of petitioners in this case are the Committee to Support U.S. Trade Laws ("CSUSTL") and the following companies and trade association members of CSUSTL: the American Iron and Steel Institute, the Coalition for Fair Lumber Imports Executive Committee, the Cold Finished Steel Bar Institute, the Copper & Brass Fabricators Council, Inc., Corey Steel Company, the Floral Trade Council, Florida Farmers, Inc., the Kansas Cattlemen's Association, the Lake Carriers Association, Lumi-Lite Candle Co., Inc., the Montana Cattlemen's Association, Nevada Live Stock Association, Nevada Committee for Full Statehood, Nucor Corporation, Steel Manufacturers Association, the Southern Shrimp Alliance, Specialty Steel Industry of North America, R-CALF USA, Republic Engineered Products, South Dakota Stockgrowers Association, the Timken Company, and the U.S. Business and Industry Council.[1]

In addition to the individual companies and trade associations identified, two other members of CSUSTL on whose behalf this brief is submitted are the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union ("USW") and the American Federation of Labor and Congress of Industrial

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Organizations ("AFL-CIO"). The USW is the largest industrial union in North America with 850,000 active members manufacturing a broad range of goods, including tires, steel and pharmaceuticals.[2] The AFL-CIO is a voluntary federation of 56 national and international labor unions representing 10.5 million members. Both the USW and the AFL-CIO have been actively engaged in using the U.S. trade laws to ensure that American jobs and industries are not lost to unfair import competition.

*Amici* collectively are advocates and beneficiaries of the antidumping statute and span a wide array of domestic industries as well as workers. Many of the CSUSTL individual members have filed petitions and successfully secured protection against unfair trade. All of the *Amici Curiae* are concerned that the U.S. antidumping law be maintained as a strong and viable remedial tool to address injurious dumping of imports. As discussed further in the Argument, the interest of Amici Curiae in this case stems from the significant loophole in the antidumping law that would result from

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2. The USW was a petitioner in the antidumping investigation of uranium products imported from the former Soviet Union and represents over 1,000 highly-skilled workers employed at the United States Enrichment Corporation, the sole U.S. uranium producer. That investigation resulted in a suspension agreement that is now negatively affected by the appellate court's decision below. The USW is the successor-in-interest in that distinct matter. The original petition was brought by the Oil, Chemical and Atomic Workers International Union ("OCAW") in 1991. In 1999, the OCAW merged with the United Paperworkers International Union to form the Paper, Allied-Industrial, Chemical & Energy Workers International Union ("PACE"). In 2005, PACE merged with the United Steelworkers of America ("USWA") to become the USW.

the Federal Circuit's holding in *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir.) (Pet. App. 8a-28a), *aff'd on reh'g*, 423 F.3d 1275 (Fed. Cir. 2005) (Pet. App. 29a-35a), *final judgment*, 506 F.3d 1051 (Fed. Cir. 2007) (Pet. App. 1a-7a).[3] The breadth of the industries and companies that could be affected by the Federal Circuit's holding is expansive. Indeed, any domestic industry or company using the antidumping law could be affected.

CSUSTL and its individual supporting members are highly concerned that the effect of the appellate court's holding would essentially permit injurious dumping, contrary to the purpose of the law. Accordingly, CSUSTL and its individual supporting members have a strong interest in this matter.

## SUMMARY OF ARGUMENT

Although recognizing the U.S. Department of Commerce ("Commerce" or "Commerce Department") as the "master of antidumping law," the Federal Circuit has failed to accord deference to Commerce's determination that the unfairly traded, imported goods at issue are subject to the antidumping law. The appellate court held that even though merchandise was manufactured in a foreign country and imported into the United States at a dumped price, causing injury to a competing U.S. industry, the antidumping law does not apply because the foreign producer is merely providing a "service" and not producing a "good."

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3. Citations are to the petitioners' appendix to the United States' petition for writ of *certiorari* in No. 07-1059 ("Pet. App.").

The Federal Circuit's decision ignores the common and statutory definitions of services that exclude activities whose output is a tangible good. The court's decision also elevates form over substance, focusing on the technical transfer of title rather than on the manufacturing operation that leads to the substantial transformation of raw materials into a different good for export. Most egregiously, the Federal Circuit ignores the purpose of the antidumping statute. The antidumping law's primary purpose is to provide a remedy to U.S. industries that are injured by dumped imports. Instead of deferring to a statutory interpretation by Commerce that would achieve that purpose, the appellate court's decision contravenes the purpose of the statute and provides a roadmap to foreign producers seeking to avoid the imposition of antidumping duties.

Unless overturned by this Court, the Federal Circuit's decision has created an expansive loophole to the U.S. antidumping law affecting domestic industries far beyond the uranium industry at issue here. A wide variety of products, including steel, lumber, textiles, brass, and semiconductors, can be sold at dumped prices into the United States and injure competing U.S. industries, but avoid the imposition of antidumping duties based simply on the terms of their contracts. Indeed, foreign manufacturers are now provided with a means to engage in dumping with impunity merely by restructuring their sales contracts. Given the critical importance of the U.S. antidumping law as the principal defense available to domestic manufacturers against unfairly traded imports, the court's holding has seriously undermined the viability of this remedy and has placed in jeopardy all industries that rely on this law to address unfair trading practices.

## ARGUMENT

### I. The Federal Circuit Erred In Failing To Give *Chevron* Deference To Commerce's Finding That The Antidumping Law Applies To The Imported Goods At Issue

In reviewing decisions of the Commerce Department, the Federal Circuit has long recognized that the laws that Commerce administers involve complex economic inquiries and that *Chevron* deference should be provided to Commerce's interpretations of the statute. *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996). Indeed, Commerce's special expertise makes it the "master of antidumping law." *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999).[4] The Supreme Court in *Chevron* required the courts to accord deference to a reasonable interpretation of the statute by an administrative agency charged with its administration. *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984). The Federal Circuit, in turn, has found that it is required to defer to permissible interpretations of the antidumping statute adopted by the Commerce Department, as the agency charged with its administration, in those instances in which the statute does not address the precise question at issue. *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1379-82 (Fed. Cir. 2001) (citing *Chevron*, 467 U.S. at 843).

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4. *See also F. Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("Commerce's special expertise makes it the 'master' of the antidumping law, entitling its decisions to great deference from the courts.") (citations omitted).

Despite this recognition, the Federal Circuit failed to give deference to the Commerce Department's reasonable interpretation of the antidumping law in this case, where the law does not address the precise question at issue. Indeed, not only is Commerce's interpretation of the statute permissible, it is also completely consistent with the purpose of the statute: to protect domestic industries from injury caused by unfairly traded goods. *Kemira Fibers Oy v. United States*, 61 F.3d 866, 874 (Fed. Cir. 1995). The Federal Circuit's determination, on the other hand, largely eviscerates the purpose of the law by elevating form over substance. As such, the Federal Circuit's decision should be reversed and Commerce's reasonable interpretation of the antidumping law sustained.

### A. The Federal Circuit Erred in Concluding that the Foreign Producer Was Not Producing a Good but Was Merely Providing a Service

In the underlying antidumping investigation of low-enriched uranium ("LEU") from France, Commerce determined that the antidumping duty law should be applied to imported merchandise produced through contract manufacturing based on the substance of the transaction. *See Notice of Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium From France*, 66 Fed. Reg. 65,877, 65,881 (Dep't Commerce Dec. 21, 2001) (hereinafter "*Final Determination*") (Pet. App. 239a). Commerce found that where the U.S. LEU purchaser supplied or arranged for the supply of raw materials to the foreign manufacturer, and those or other similar raw materials were substantially transformed through a manufacturing process into a different product that was then imported into the United States at an unfair

price, that activity comprised the production of a good not the provision of a service and, as such, was subject to the antidumping duty law. Pet. App. 238a-239a.

As Commerce explained, when a "purchaser has contracted out for a major production process that adds significant value to the input and that results in the substantial transformation of the input product into an entirely different manufactured product," that manufacturing process cannot be regarded as merely a "service" and outside the reach of the antidumping law. Pet. App. 240a. Indeed, the substance of this transaction is identical to the typical sales transaction in which a U.S. purchaser simply pays the foreign manufacturer to produce merchandise that is imported into the United States. Had that been the arrangement here, there would be no dispute that the transaction is subject to the antidumping law.

Given that the manufacturing activities performed in both instances are the same, the article produced in both cases is identical, and the injurious effect on competing U.S. producers is also the same irrespective of the structure of the arrangement, Commerce reasonably concluded that the transaction at issue involved the production of a good that was sold to a U.S. buyer and imported into the United States and, as such, was subject to the antidumping law. *Final Remand Determination, USEC Inc. and United States Enrichment Corp. v. United States* (Dep't Commerce June 23, 2003) (hereinafter "*Remand Determination*") (Pet. App. 131a, 134a). Indeed, as Commerce stated, it has "always considered the output from manufacturing operations that result in subject merchandise being

introduced into the commerce of the United States to be a good" and subject to the antidumping law. *Final Determination*, 66 Fed. Reg. at 65,881 (Pet. App. 240a).

Rather than sustaining Commerce's permissible interpretation of the statute, the Federal Circuit determined that *Chevron* deference was not warranted because "the antidumping statute unambiguously applies to the sale of goods and not services." *Eurodif*, 423 F.3d at 1278 (Pet. App. 33a). That conclusion focuses on the wrong issue. The question is not whether the antidumping statute applies to the sale of goods and not services. The question is whether the transaction here is fairly characterized as the sale of a good rather than the sale of a service. That question is not "unambiguously" resolved by the statute and, as such, *Chevron* deference should have been accorded to the agency's decision.

The antidumping statute does not define the terms "good" or "service," so deference under *Chevron* to the Commerce interpretations of those terms is warranted. 467 U.S. at 843. Commerce's distinction between goods and services is consistent with the common meanings of those terms. In common parlance, a sale of services generally refers to professional services, such as legal or medical services, or to activities such as maintenance, repair or other types of aid, while a sale of goods refers to a tangible good. The transaction at issue here involves the manufacturing of enriched uranium and the output is unquestionably a tangible good.

Commerce's determination is also consistent with the manner in which Congress has defined services

in other international trade legislation. In the International Trade and Investment Act, Congress defined services for purposes of authorizing the U.S. Trade Representative to coordinate and implement policies on the international trade in services. 19 U.S.C. § 2114b(5) (2000).[5] In that context, Congress defined "services" as "economic activities whose outputs are *other than tangible goods*." *Id.* (emphasis added). Examples of services identified in that statute are activities such as banking, insurance, transportation and professional services. *Id.* Commerce's finding that a good rather than a service was involved in this case is supported by this statutory definition of services as well.

The Federal Circuit's reliance on its earlier decision in *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002), to support its conclusion that the transaction at issue involved the provision of a service rather than the production of a good was in error. Pet. App. 20a-24a. The *Florida Power* case did not involve an interpretation of whether a sale of goods occurred under the antidumping law or any international trade statute but rather an interpretation of a contract under the Contract Disputes Act of 1978, 41 U.S.C. § 601 *et. seq.*, 307 F.3d at 1373. Even in that context, the court admitted that the transaction at issue did "not fall neatly" into either the category of a service or a good, but simply concluded that it was "best characterized" as one for a service for purposes of the Contract Disputes Act. *Id.* Based on this very different context, it was erroneous for the Federal Circuit to rely on the

5. Unless otherwise indicated, all references to the United States Code are to the 2000 edition.

*Florida Power* case to find that the transaction at issue here was clearly one for a service and, on that basis, to refuse to accord *Chevron* deference to the Commerce decision.[6] Pet. App. 33a.

### B. The Federal Circuit Elevated Form Over Substance in Finding that a Sale of Merchandise Did Not Occur Under These Facts

The Federal Circuit also relied heavily on the statutory reference to a sale of merchandise as somehow placing the transaction at issue outside the reach of the antidumping law. In particular, the court cited the phrase "foreign merchandise is being, or is likely to be sold" in 19 U.S.C. § 1673(1), and concluded that this phrase does not encompass the transaction at issue in this case. 423 F.3d at 1278 (Pet. App. 33a). The antidumping law, however, does not define the terms "merchandise" or "sold." Again, in the absence of plain statutory language, *Chevron* deference is due to the Commerce Department in interpreting these terms in the antidumping law.

In this case, LEU was produced in France and exported to a purchaser in the United States. That the transaction was structured so that the U.S. buyer paid for the raw materials separately from the production of the LEU does not mean that a sale of foreign

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6. The Federal Circuit's decision in this respect is also inconsistent with the Supreme Court's recognition that deference to the agency's interpretation is appropriate for ambiguous statutes even when the court has previously construed the statute. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

merchandise did not occur, as the Federal Circuit found. Just as is the case where the foreign manufacturer first purchases the raw materials and manufactures them into a new product, the foreign manufacturer here produces and delivers to the customer a new, substantially-transformed good from raw materials the customer purchased separately. It would elevate form over substance to find that the antidumping laws apply to one form of this transaction but not the other, where the substance of both transactions is the same.

This Court recognized in *United Gas Improv. Co. v. Cont'l Oil Co.* that where a transaction was structured as a sale of leases instead of a sale of a product (natural gas), it "would exalt form over substance" and "give greater weight to the technicalities of contract draftsmanship" than to the purpose of the governing statute to fail to treat the transaction as a "sale." 381 U.S. 392, 400 (1965). Similarly, in *Gray v. Powell*, the Court rejected the claim that there had been no "sale or delivery or offer for sale" by the producers where the contract was structured as a sale of leases, stating: "the purpose of Congress, which was to establish the industry through price regulation, would be hampered by an interpretation that required a transfer of title, in the technical sense, to bring a producer's coal, consumed by another party, within the ambit of the coal code." 314 U.S. 402, 416 (1941).

The Supreme Court, therefore, has admonished against elevating form over substance where a contract was not technically structured as one for the sale of goods, as well as against focusing on the technical transfer of title, in defining a sale when interpreting the

reach of a statute. Instead, the Court's focus has been on the purpose Congress sought to achieve by the governing statute. Consistent with the antidumping statute and its purpose, the transaction at issue in this case falls squarely within the reach of the antidumping law. *See* section I.3, *infra*.

In reviewing the antidumping law, Congress has also made clear that the antidumping law covers transactions that, in substance, are tantamount to sales regardless of the structure of the transaction. When confronted with a situation in which transactions were structured as leases instead of sales, Congress clarified the reach of the antidumping statute to state that the law applied to such arrangements:

> The addition of language regarding leases is intended to clarify the applicability of both laws {the antidumping duty statute and the countervailing duty statute} to sham leases or leases which are tantamount to sales. Because of tax considerations or other business reasons, leasing arrangements are often utilized to accomplish what are in effect transfers of ownership. The Subcommittee intends that the coverage of both laws extend to such arrangements if the Department of Commerce finds them to be equivalent to sales.

H.R. Rep. No. 98-725, at 11 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5127, 5138. Commerce was instructed to consider, in determining whether a lease is equivalent to a sale for purposes of the antidumping duty law, "whether the lease transaction would permit avoidance

of" antidumping duties. 19 U.S.C. § 1677(19)(F). This legislative clarification demonstrates Congress' intent that arrangements structured as leases in form but equivalent to sales in substance are covered by the antidumping law. Given this broad legislative intent, it cannot be contended that contracts structured as sales of "services" that are equivalent to sales of goods would not be subject to the antidumping law.

Notably, under the facts presented here, it is not even the case that the raw materials owned by the purchaser were necessarily the same raw materials from which the finished product that was imported into the U.S. market was produced. *Remand Determination*, Pet. App. 226a-227a; *Final Determination*, Pet. App. 133a. The raw material input, uranium, is a fungible product. As such, the foreign producer manufactured the LEU from uranium generally, but not necessarily from the precise raw materials owned by the purchaser. *Id.* The LEU purchaser's claim that it owns material that was processed by the foreign producer and returned to it is not technically true but is, as the lower court recognized, a "legal fiction." *See USEC Inc. v. United States*, 281 F. Supp. 2d 1334, 1424 (Ct. Int'l Trade 2003) (Pet. App. 43a-44a) (citations omitted). Although CSUSTL believes that any contract manufacturing transaction should be considered a sale within the meaning of the antidumping law, it is particularly difficult to sustain the Federal Circuit's conclusion that no sale of goods was involved under these facts, where the actual raw materials owned by the purchaser were not necessarily used in the production of the finished, imported good.

Moreover, whether the finished product was made from the raw materials supplied by the purchaser is irrelevant; the foreign producer necessarily acquired an ownership interest in the LEU when it substantially transformed the raw materials, regardless of their source, into a new and different product. That ownership interest was then transferred to the buyer when the U.S. purchaser took delivery of the LEU, a substantially-transformed product.

As the *Gray v. Powell* court recognized, the transfer of title should not be the determinative factor in defining a sale where such a result defeats the purpose Congress sought to achieve. 314 U.S. at 416. The foreign manufacturer is engaging in the same production operations and producing the same product. Indeed, under these contract manufacturing arrangements, the difference is often merely which party carries the financing costs of the raw materials. This arrangement does not transform the activity of the foreign manufacturer into that of providing a service rather than producing a good, does not alter the fact that a sale of imported merchandise at a dumped price occurred, and should not permit the parties to avoid the reach of the antidumping law.

### C. The Federal Circuit's Holding Is Inconsistent With The Antidumping Statute, Its Legislative History And Its Remedial Purpose

Not only is Commerce's decision reasonable given the language of the statute, it is also fully consistent with the purpose of the antidumping law. The primary purpose of the antidumping law is to protect domestic industries from unfairly traded imports. *Kemira Fibers*, 61 F.3d at 874; S. Rep. No. 96-249 at 37, 39, 87 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 423, 473.[7] The Federal Circuit has recognized that the antidumping statute is a "remedial" law intended to offset the effects of unfairly traded imports so as to prevent harm to competing U.S. producers. *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103-04 (Fed. Cir. 1990). The law does not operate to preclude subject imports from entering the U.S. market but rather imposes remedial duties to neutralize the unfair trading practice. *Nucor Corp. v. United States*, 414 F.3d 1331, 1336-37 (Fed. Cir. 2005).

The antidumping statute is fully consistent with and, indeed, a necessary component of, an equitable global system of trade. For many years, high tariffs were imposed to protect industries from competition with imported products. As succeeding rounds of

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7. *See also Koyo Seiko Co. v. United States*, 20 F.3d 1156, 1159 (Fed. Cir. 1994) ("The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value.") (citing *Smith-Corona Group v. United States*, 713 F.2d 1568, 1575-76 (Fed. Cir. 1983)); *Hynix Semiconductor, Inc. v. United States*, 424 F.3d 1363, 1368 (Fed. Cir. 2005).

international agreements under the auspices of the General Agreements on Tariffs and Trade ("GATT") took place, tariffs were reduced or eliminated, and antidumping laws increased in importance as an important means to prevent injury to domestic industries from unfairly traded imports. Indeed, some analysts have recognized that the maintenance of strong antidumping laws to protect domestic industries from injurious, unfairly priced imports "may be necessary in order to maintain political support for an open international trading system." Congressional Budget Office, *How the GATT Affects U.S. Antidumping and Countervailing-Duty Policy*, at 23 (Sept. 1994) {hereinafter "CBO Report"}(citation omitted).

This Court has held that remedial statutes are to be broadly interpreted consistent with their purpose. *Atchison T. & S. F. R. Co. v. Buell*, 480 U.S. 557, 571 (1987) (citing *Urie v. Thompson*, 337 U.S. 163, 180 (1949)). A broad interpretation of the antidumping law is appropriate because "{t}he purpose of the {antidumping law} is to prevent dumping, an activity defined in terms of the marketplace." *Lasko Metal Prods. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994). The effect on the marketplace, rather than the terms of a contract, therefore, is the appropriate context in which to consider whether the imports at issue are subject to the antidumping duty law.

Given that the primary purpose of the antidumping law is to provide remedial relief to domestic industries injured by unfairly traded imports, the statute should not be interpreted in such a way as to make it more difficult for domestic industries to obtain such relief. The

holding of the Federal Circuit, unfortunately, does precisely that. The appellate court's holding, in fact, provides a major loophole to foreign producers seeking to evade the reach of the U.S. antidumping law.

It is noteworthy that when Congress has had an opportunity to amend the antidumping duty law, it has generally done so to strengthen it and expand its reach. The first major amendment to the antidumping law under the Trade Act of 1974 "significantly expanded the coverage of U.S. antidumping law." CBO Report at 25 (citing 19 U.S.C. § 2101, 88 Stat. 1978). Similarly, the three subsequent, major amendments to the trade laws – the Trade Agreements Act of 1979, the Trade and Tariff Act of 1984, and the Omnibus Trade and Competitiveness Act of 1988 – all "had provisions that continued the Congress' long push for stronger AD/CVD protection for U.S. firms." *Id.* at 27 (citations omitted).

Congress has amended the antidumping law, in particular, to address actions by foreign producers and importers that seek to circumvent an antidumping order. In 1979, Congress enacted a statutory provision designed "'to deter exporters whose merchandise is subject to an investigation from circumventing the intent of the law by increasing their exports to the United States during the period between initiation of an investigation and a preliminary determination by {Commerce}'" *ICC Indus., Inc. v. United States*, 812 F.2d 694, 700 (Fed. Cir. 1987) (quoting H.R. Rep. No. 96-317 at 63 (1979)). In 1988, Congress further amended this provision to develop "an improved critical circumstances procedure {that} will significantly strengthen antidumping and countervailing duty

procedures. . . ." H.R. Rep. No. 100-576 at 611 (1988) (conference report). In 1994, Congress amended the anti-circumvention provisions in the statute, stating that it "expects and intends that the new standard will be less difficult to meet, thereby improving our ability to prevent circumvention {of the antidumping law}." S. Rep. No. 103-412 at 82 (1994). In 2006, Congress amended the antidumping law to prevent foreign producers from exploiting a loophole in the "new shipper" provision that was undercutting the intended remedial effect of the law. Pension Protection Act, Pub. L. No. 109-280, § 1632(a), 120 Stat. 780, 1165; *see also* CRS Report for Congress, "Trade Remedies: 'New Shipper' Reviews," Order Code RS22290 at 3-4 (Dec. 18, 2006).

In sum, Congress has repeatedly revised the antidumping law to strengthen that law and to ensure that the Commerce Department is able to address a wide array of activities that would circumvent its terms and defeat its purpose of protecting U.S. industries from harm caused by dumped imports. In light of this legislative intent and the purpose of the antidumping law, Commerce properly concluded in this case that parties should not be able to avoid the reach of the law merely by structuring their transactions in a particular manner. As Commerce stated:

> the unfair trade laws must be applicable to merchandise produced through contract manufacturing, just as they are applicable to merchandise manufactured by a single entity. To do otherwise would contravene the intent of Congress by undermining the effectiveness

> of the {antidumping duty} laws, which are designed to address practices of unfair trade in goods, as well as have profound implications for the international trading systems as a whole. To the extent that contract manufacturing can be used to convert trade in goods into trade in so-called "manufacturing services," the fundamental distinctions between goods and services would be eliminated, thereby exposing industries to injury by unfair trade practices without the remedy of the {trade} laws.

*Final Determination*, 66 Fed. Reg. at 65,881 (Pet. App. 239a).

The Federal Circuit's holding that the transaction at issue is not subject to the U.S. antidumping law, by contrast, contravenes the purpose of the statute and permits dumped imports to injure a U.S. industry without legal recourse. The appellate court's decision is inconsistent with the legislative intent of Congress to protect domestic industries from unfairly traded imports and fails to recognize the broad reading of the statute that is appropriate given its remedial purpose.

## II. The Federal Circuit's Decision Creates An Expansive Loophole To The U.S. Antidumping Law

The effects of the appellate court's holding are not limited to the uranium industry but have sweeping implications for all domestic industries that rely upon the U.S. trade laws as a remedy against unfairly traded imports. The Federal Circuit's decision in *Eurodif* has created a major loophole to the antidumping law and provided a roadmap to its circumvention that extends well beyond uranium. Foreign producers are now on notice that they may avoid the imposition of antidumping duties simply by structuring their contracts with U.S. purchasers in the manner used by the French uranium producer.

The broad holding by the Federal Circuit means that where dumped merchandise is imported into the United States and causes injury to a U.S. industry, no remedial action is possible under the antidumping statute if the parties set up a contract manufacturing arrangement. Under such an arrangement, a purchaser may acquire raw materials and deliver those materials to the foreign producer to be substantially transformed into a completely different article of commerce. Alternatively, a foreign producer may produce and deliver the finished product to the customer under the contract processing arrangement even before the customer has supplied the raw material and without using the actual raw materials purchased by the U.S. buyer. Pet. App. 133a, 226a-227a. Nonetheless, by structuring their sales in these contractual terms, foreign producers can insulate themselves from the reach of the antidumping law.

Various products, including steel and other metal products, chemicals, and textiles, often are sold under contract manufacturing arrangements. A U.S. brass purchaser, for example, in lieu of purchasing brass sheet and strip, could restructure the contract with the foreign producer so that the purchaser acquires and takes title to the raw material, copper, initially, and then transfers the copper to the foreign producer to be manufactured into brass sheet and strip. Similarly, purchasers of imported pasta could supply wheat to be transformed into pasta, purchasers of semiconductors could supply sand to be processed into semiconductors, and purchasers of bedroom furniture could supply wood to be manufactured into furniture. So long as the contracts are structured to have the purchaser retain title to the input, the overseas manufacturing operation – no matter how significant that operation and no matter that it substantially transformed the raw materials into another product that is then exported to the United States – would be considered by the Federal Circuit as a "service" and the resultant imported merchandise would escape the reach of the antidumping law.

It should not be the case that merely by structuring the terms of the transaction in a particular manner foreign producers can escape the payment of antidumping duties that would otherwise be owed. Congress could not have intended that the very parties that are the targets of the antidumping law could so easily evade that law simply by restructuring their sales terms. Such a result essentially vests in the parties seeking to avoid the reach of the antidumping law the ability to opt out of the law's application through their contractual terms. The Federal Circuit's decision,

permitting foreign sellers to avoid the application of a remedy intended to protect U.S. industries based simply on the structure of their contracts, reflects an absurd interpretation of this remedial statute.

Nor should it be the case that domestic industries that are injured by reason of these dumped imports have no recourse under the law where contract manufacturing arrangements exist. The opportunity for mischief and evasion of the antidumping law under the Federal Circuit's holding is extensive. Based on the court's roadmap for avoiding the antidumping law, the protection that had been afforded in the antidumping law to U.S. producers and workers injured by unfairly traded imports is in serious jeopardy.

The trade remedy laws, including in particular the antidumping laws, are the only defense available to U.S. manufacturers against unfairly traded imports. The loophole to the antidumping law created by the Federal Circuit's decision dramatically undermines the viability of this remedial tool to domestic industries injured by dumped imports.

## CONCLUSION

The judgment of the U.S. Court of Appeals for the Federal Circuit should be reversed and the Commerce Department's determination upheld.

Respectfully submitted,

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Nos. 07-1059, 07-1078

# In the Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

v.

EURODIF S.A., *et al.*,

*Respondents.*

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USEC, INC., *et al.*,

*Petitioners,*

v.

EURODIF S.A., *et al.*,

*Respondents.*

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ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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## BRIEF OF THE NATIONAL ATOMIC COMPANY "KAZATOMPROM" AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICUS CURIAE* [1]

The National Atomic Company "Kazatomprom" ("Kazatomprom") is the state-owned national nuclear company of the Republic of Kazakhstan. It is responsible for the exploration, mining, production and sale of Kazakhstan's uranium resources for use in the worldwide nuclear fuel cycle, as well as for the development of other mineral resources of the Republic of Kazakhstan. Kazakhstan is estimated to have more than fifteen percent of the world's total reserves of uranium. It is expected by 2010 to be the world's leading uranium producer. It is already one of the largest exporters of natural uranium to the United States, and a substantial percentage of its uranium production is ultimately used by power companies in the United States.

Kazatomprom and the Republic of Kazakhstan are committed to the production and use of uranium for peaceful purposes. When it achieved independence on December 25, 1991, Kazakhstan found itself with one of the world's largest arsenals of nuclear weapons. Working in cooperation with the United States, Kazakhstan voluntarily dismantled its entire nuclear arsenal – totaling approximately 1,300 nuclear warheads, along with delivery systems – making it the first nation ever to destroy all of its nuclear weapons voluntarily.

Kazakhstan promptly joined the Nuclear Non-Proliferation Treaty as a non-nuclear weapon state.

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[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity other than *amicus curiae*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Written consent of the parties to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

It is a member of the International Atomic Energy Agency and is a participating government in the Nuclear Suppliers Group. Kazakhstan has also entered into an agreement in principle with the United States to assist in the blending down of weapons-grade uranium to nuclear fuel to be used for peaceful purposes. Kazakhstan has signed bilateral agreements with the United States and the European Community on cooperation in the spheres of nuclear safety and the peaceful use of atomic energy. All Kazatomprom exports of uranium unconditionally comply with the terms of the Nuclear Non-Proliferation Treaty, the rules and standards of the International Atomic Energy Agency, and all Nuclear Suppliers Group Guidelines.

Kazakhstan's uranium is fairly traded. Kazakhstan was investigated and prevailed in a dumping proceeding under the U.S. antidumping laws involving its sales of uranium to the United States. As a result, uranium from Kazakhstan may be sold to U.S. companies and imported into this country free from dumping duties.[2]

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[2] On December 23, 1991, two days prior to the breakup of the Soviet Union, the United States International Trade Commission issued a preliminary determination that the Soviet Union was selling uranium at less than fair value in violation of U.S. dumping law. *Investigation No. 731-TA-539 (Preliminary); Uranium From the U.S.S.R.*, 57 Fed. Reg. 68 (Jan. 2, 1992). That preliminary determination was applied to Kazakhstan and the other newly formed former Soviet Republics that produced uranium. As a result, Kazakhstan was born facing a preliminary dumping determination. As a temporary solution, Kazakhstan entered into a Suspension Agreement with the United States under which it agreed to limit its uranium sales to the United States. *Antidumping; Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan;*

Kazakhstan does not itself have facilities to enrich uranium. It sells its uranium to utilities, including utilities in the United States, which then enter into contracts with service providers to have this non-dumped uranium enriched so that it can be used in the utilities' nuclear reactors to produce electricity for consumers.[3] As mentioned, a substantial portion of Kazatomprom's uranium is ultimately used by utility companies in the United States.

Kazatomprom has a significant interest in ensuring that the U.S. government does not reach beyond the unambiguous limitations of U.S. anti-dumping law to unlawfully apply antidumping duties to enrichment services. Such a decision would force U.S. utilities and U.S. consumers, in effect, to pay antidumping duties on non-dumped Kazakh uranium, unless they choose to have that uranium enriched by USEC, which is the sole U.S. provider of enrichment services. Reversing the decision below

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*Suspension of Investigations and Amendment of Preliminary Determinations*, 57 Fed. Reg. 49220 (Oct. 30, 1992). Kazakhstan strictly honored its obligations under the agreement while it was in effect. Kazakhstan terminated the agreement in November of 1998, to allow the dumping investigation to proceed so that Kazakhstan could obtain a final, country-specific determination under the law. Kazakhstan prevailed in that final determination. *Uranium from Kazakhstan*, Investigation No. 731-TA-539-A (Final), USITC Publ'n No. 3213 (July 1999).

[3] Low enriched uranium is produced from solid uranium oxide ($U_3O_8$ or yellowcake), refined to uranium dioxide, converted into a gas (uranium hexafluoride gas or $UF_6$), and enriched to increase the concentration of the radioactive isotope sufficient to achieve fission. The Fuel Cycle in Brief, http://www.world-nuclear.org/how/fuelcycle.html.

would effectively impose an additional cost on fairly traded Kazakh uranium and disrupt the business relationships between Kazatomprom and its U.S. utility customers. It would also place an additional burden on U.S. consumers at a time when nuclear power is increasingly seen as a safe and economic alternative to high-priced foreign oil.

## SUMMARY OF ARGUMENT

A reversal of the Federal Circuit's decision below[4] on the basis urged by Petitioners would give U.S. authorities unprecedented power to expand the U.S. antidumping law beyond the limits imposed by its text. That law is a limited exception to the general internationally negotiated rules designed to liberalize global trade and proscribes only very specific kinds of behavior not present here. Moreover, expanding the law to behavior it unambiguously does not reach, as Petitioners seek, would place a significant burden on U.S. energy consumers.

Specifically, the Government is asking this Court to rule that it may apply antidumping duties under 19 U.S.C. § 1673 to contracts for enrichment services. As found by the Federal Circuit and the Court of International Trade below, the U.S. antidumping law clearly applies only to dumped sales of foreign merchandise in the United States and thus does not apply to contracts for enrichment services.

Petitioners argue that, in order to fulfill the "purpose" of the statute and prevent opening a "loop-

[4] *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005) (Pet. App. 8a-28a), *aff'd on reh'g*, 423 F.3d 1275 (Fed. Cir. 2005) (Pet. App. 29a-35a), *final judgment*, 506 F.3d 1051 (Fed. Cir. 2007) (Pet. App. 1a-7a).

hole," the Court must interpret the statute to permit subjecting contracts for enrichment services to dumping duties. Changing a law to expand its reach, however, is a task for Congress—not this Court—when the statute's text is unambiguous.

Moreover, Petitioners' articulation of the "purpose" of the law is incomplete and misleading. The U.S. antidumping law is a limited exception to the trade liberalization that has been the undisputed goal of several rounds of multilateral trade negotiations. That exception is carefully spelled out in international agreements to which the United States is a party, and in the U.S. laws that were enacted by Congress specifically to implement those agreements. The antidumping law is not some broad protectionist catch-all provision as described by Petitioners. Rather, it is a carefully worded statute designed to address well-defined behavior and to do so in accordance with U.S. international obligations. The Court would best fulfill that purpose by respecting the statute's express limitations.

Such careful attention to the statute's text is especially important here because impermissibly including uranium enrichment services within the scope of the antidumping statute could have a profoundly negative effect on U.S. interests. There is only one U.S. entity that provides enrichment services: USEC, one of the Petitioners. As a practical matter, applying dumping duties to contracts for enrichment services would mean less competition for USEC, which would be free to charge higher prices for such services.[5] While reduced price competition

[5] Indeed, if this Court accepts the Government's reading of the statute, more than 60 percent of the world capacity for enrichment services – and more than 75 percent of enrichment capacity outside the United States – would be subject to dump-

would be a tremendous boon for USEC, its windfall would come at a high price: U.S. nuclear power companies would be forced to pay more for enrichment, thereby exacerbating the rising energy costs that are already an increasing burden for millions of Americans today.

The potential ramifications for U.S. interests counsel against accepting the interpretation of the antidumping law urged by Petitioners, especially when it represents a radical departure from both the statute's text and its historical application. Congress – not the judiciary – is the proper branch of government to weigh and evaluate the complex and wide-ranging issues of international law, trade policy, and energy policy at the heart of this dispute, and decide whether to expand the antidumping laws beyond their present scope to encompass uranium enrichment.

The Court should thus affirm the decision below.

## ARGUMENT

### I. UNDER THE PLAIN TERMS OF THE STATUTE, URANIUM ENRICHMENT SERVICES ARE NOT SUBJECT TO DUMPING DUTIES

The antidumping statute by its terms applies only to foreign merchandise sold in the United States. The statute provides that dumping duties may be imposed on the basis of a determination that "foreign merchandise is being, or is likely to be, sold

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ing penalties. Russia accounts for more than 53 percent of non-U.S. enrichment capacity. France accounts for another almost 23 percent of non-U.S. global capacity. *See* European Comm'n, *Euratom Supply Agency – Annual Report 2007* 13 (2007), http://ec.europa.eu/euratom/ar/last.pdf.

is the United States at less than its fair value." 19 U.S.C. § 1673(1).[6]

Petitioners do not dispute that the statute requires a sale of merchandise at less than fair value. They argue, however, that Eurodif's enrichment of uranium for utility companies should be treated as a sale of merchandise because it enables the utilities to acquire low enriched uranium, the product that is subject to the investigation.[7] But the only sale Eurodif has made is a sale of its services – of enriching uranium. Eurodif has no right to the underlying uranium, no right to designate to whom the ultimate product produced as a result of its services should be delivered, or at what price it should be sold. It is simply providing the owner of that uranium with the service of enrichment. Enrichment is certainly an important process, but is not a sale of merchandise.

Indeed, the Commerce Department's current contention that Eurodif's provision of enrichment services constitutes a sale of merchandise is directly contrary to its prior interpretation of the statute. As

[6] The Federal Circuit has consistently held that the statute plainly requires the sale of foreign merchandise in the United States and that, because the terms "sale" and "sold" are clear on their face, there is no reason to defer to the agency in the definition of those terms. *See, e.g., AK Steel Corp. v. United States*, 226 F.3d 1361, 1371 (Fed. Cir. 2000). ("Since there can be no real ambiguity about these terms ["sale" and "seller"], contrary to the assertions of the appellees, we are not required to do any analysis under the second part of the *Chevron* test."); *NSK Ltd. v. United States*, 115 F.3d 965, 974 (Fed. Cir. 1997) (rejecting the argument the court should defer to the government's interpretation of the word "sale" because it was necessary to "prevent[ ] a loophole in the antidumping law . . . ").

[7] *See* Brief for the United States ("Gov. Br.") at 28-29.

the Department previously stated: "The single 'relevant sale' must be a sale by the company that owns the merchandise entirely, including all essential components, can dispose of the merchandise at its own discretion, and, thus, controls the pricing of the merchandise and not merely the pricing of certain portions of production."[8] As the Department went on to explain, a subcontractor which "performs one or more segments of the manufacturing process" is not a seller of the merchandise:

> [W]hile the subcontractor may control the sale of its subcontracting services, it cannot control the sale of the merchandise itself . . . . [A]lthough a subcontractor may deliver to the contractor a product which, based on its characteristics, is subject merchandise, the price paid to the subcontractor . . . is only for the work performed by the subcontractor; that is, the sale by the subcontractor is only a sale of the service it performed . . . . [W]e do not consider the "sale" between the subcontractor and

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[8] Response to Court Remand, *Taiwan Semiconductor Mfg. Co. v. United States*, 100 F. Supp. 2d 1109 (Ct. Int'l Trade 2000) (No. 98-05-02184), http://ia.ita.doc.gov/remands/00-48.htm. *See also Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Dynamic Random Access Memory Semiconductors of One Megabit and Above ("DRAMs") From Taiwan*, 64 Fed. Reg. 28983, 28986 (May 28, 1999); *Certain Pasta from Italy: Preliminary Results of New Shipper Antidumping Duty Administrative Review*, 63 Fed. Reg. 53641, 53642 (Oct. 6, 1998).

such a contractor to be a sale of subject merchandise at all.[9]

That reasoning is directly applicable here. Although Eurodif may deliver a product to the utility which, based on its characteristics, is the merchandise subject to the investigation, the only thing Eurodif has sold, and the only thing for which it is being paid, is its enrichment services.[10] It has not

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[9] *Id. See also Taiwan Semiconductor Mfg. Co. v. United States*, 143 F. Supp. 2d 958, 966 (Ct. Int'l Trade 2001) (holding manufacturing services contracts are not goods for purposes of the dumping law; *Barseback Kraft AB v. United States*, 36 Fed. Cir. 691, 705 (1996), *aff'd*, 121 F.3d 1475 (Fed. Cir. 1997) ("It is clear, then, from the process itself, that the [uranium enrichment] customers are contracting for services, not goods . . . . ").

[10] Because of the absence of a sale of merchandise by Eurodif, the Commerce Department was forced to engage in a totally unprecedented and artificial analysis to determine whether Eurodif had sold merchandise at less than fair value. It recognized that it could not compare the prices that Eurodif charged for enrichment services to its U.S. utility customers and others, because enrichment is only a service not subject to the investigation. It therefore had to construct a price for the product, low enriched uranium, that was subject to the investigation. As it said, it "translated prices and costs involved in the SWU [service] contracts to an LEU [product] basis." *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Low Enriched Uranium from France*, 66 Fed. Reg. 36743, 36746 (July 13, 2001). But since Eurodif did not sell that product, there were no prices to compare. To get around this, Commerce artificially constructed a sale adding a value for a natural uranium component (that was not based on what any party actually paid) to both the U.S. and foreign sides of the equation and also added costs to the foreign side of the equation. This methodology was unprecedented, had no basis in the statute and was purely the result of the Department's attempt to apply the antidumping

made a sale of merchandise subject to the antidumping law.

## II. COURTS DO NOT RE-WRITE UNAMBIGUOUS STATUTES

Even if Petitioners had a credible basis for arguing that the application of the statute only to sales of merchandise and not to enrichment services somehow undermined the statute's "purpose" and created a "loophole," that would not give the Court leave to re-write the terms of the statute, which are clear and unambiguous on their face.[11] *See, e.g., K*

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laws to a transaction to which they do not apply. Like Procrusteus, finding that the transaction did not fit, Commerce simply stretched it to fit the bed.

[11] Petitioners' claims that widespread evasion of the dumping laws will occur if the purported "loophole" is not closed appear apocryphal. *See* Gov. Br. at 34. For example, their assertion that purchasers are likely to ship massive quantities of iron ore or slabs of steel or trees to other countries to be fabricated to avoid the dumping laws is fanciful. The costs of doing so would be prohibitive.

Petitioners are also attempting to misuse the dumping laws when they argue that the Court should interpret those laws to force Russia to devote its enrichment capacity to the low-profit work of blending down highly enriched uranium under the U.S. Russia HEU agreement. Petitioners argue that the Federal Circuit's interpretation will enable Russia to make much more money through the high-profit work of enriching uranium commercially for utilities, and the Court should interpret the law to stop that. *See* Gov. Br. at 38-39. But that argument turns the dumping law on its head. The purpose of that law is to prevent unfairly low-priced and below-cost sales of products into the U.S. market. It is a perversion of the law to use it to prevent foreign manufacturers from making high-profit sales, and it is particularly wrong when the effort is made, as here, to extend the law beyond sales of products to contracts for services. There are many valid ways for the government to

*Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("If the statute is clear and unambiguous 'that is the end of the matter . . . . '"). The judiciary is not the proper branch of government to which such arguments should be directed. *See, e.g., Hanover Bank v. Comm'r*, 369 U.S. 672, 682 (1962) (noting that the government's argument "that the statute has created a tax loophole of major dimension that should be closed . . . might have been persuasive in securing enactment of the amendments to the statute . . . [but] . . . may not, of course, have any impact upon our interpretation of the statute under review"); *Iselin v. United States*, 270 U.S. 245, 250-51 (1926) ("The statute was evidently drawn with care. Its language is plain and unambiguous. What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."); *see also Pavone v. Citicorp Credit Servs., Inc.*, 60 F. Supp. 2d 1040, 1048 (S.D. Cal. 1997) ("Pavone argues, in essence, that the purpose of the FDCPA will be frustrated if Citicorp can simply organize its corporate activities so as to avoid the coverage of the statute . . . . While Pavone's suggestions for closing this loophole in the FDCPA may be well taken, they must be directed to Congress as this Court has no power to rewrite the statute.").[12]

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provide incentives for Russia to blend down highly enriched uranium under the HEU agreement; misinterpreting the antidumping statute is not one of them.

[12] Petitioners cite to Congress's 1984 amendment of the statute to include leasing arrangements as evidence that the term "sale" in the statute should be interpreted expansively. *See* Gov. Br. at 30-31. What the amendments show, however, is

Petitioners are similarly incorrect in arguing that this Court must defer to the Commerce Department's interpretation of the statute under *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron's* deference is appropriate only when "the statute is silent or ambiguous with respect to the specific issue," or, in other words, when "Congress has explicitly left a gap for the agency to fill . . . . " *Id.* at 843. The specific issue here, simply stated, is whether the statute applies to a transaction that does not involve a sale of merchandise. But the statute by its express terms extends only to sales of merchandise. There is no ambiguity – no purposeful "gap" Congress left for the agency to fill – and thus no basis for *Chevron* deference.

## III. THE ANTIDUMPING LAW IS NOT A BROAD MEASURE THAT SHOULD BE INTERPRETED EXPANSIVELY TO PROTECT U.S. MANUFACTURERS, BUT A LIMITED EXCEPTION TO THE GENERAL INTERNATIONALLY NEGOTIATED RULES DESIGNED TO LIBERALIZE TRADE AND ELIMINATE TARIFFS

The government's argument – in effect, that the antidumping law is a broad remedial statute that should be interpreted expansively to protect domestic industries – is simply wrong. As Professor John Jackson has pointed out, the antidumping law "is

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that, when Congress wanted to expand the scope of the statute beyond its plain terms, it did so explicitly. Indeed, with respect to similar laws that restrict their application only to "goods" or "merchandise," Congress has recognized the need to pass amendments if a service is going to be covered. *See, e.g.*, Trade Adjustment Assistance Protection Act, H.R. 3801, 110th Cong. (1st Sess. 2007) (amending trade adjustment assistance to cover workers in service fields in addition to those currently covered who produce "goods").

something of an anomaly: in essence it is an 'exception' to GATT [the General Agreement on Tariffs and Trade], allowing certain measures that would otherwise be a violation of the GATT." John H. Jackson, *World Trade and the Law of GATT* 411 (1969). As Professor Jackson emphasized, "the circumstances in which these measures are allowed are . . . carefully circumscribed." *Id.*

By way of background, our current international trading system was developed largely in reaction to what were perceived to be the mistakes made by various nations prior to World War II in increasing tariffs. Increased tariffs, enacted in the early 1930s in the United States under the Smoot-Hawley Tariff Act and under comparable measures elsewhere, led to sharp declines in international trade. Many believed that these trade restrictions had the effect of deepening the Great Depression and were thus one of the causes that led to World War II. Following the end of the war, "[p]olitical leaders in the United States and elsewhere" were committed to "establishing post-war economic institutions that would prevent these mistakes from happening again." John H. Jackson, *The World Trading System* 36 (2d Ed. 2000). The negotiation of the GATT, and the establishment of the World Bank and the International Monetary Fund, were three pillars of the post-World War II economic system. *See* Raj Bhala & Kevin Kennedy, *World Trade Law* 1 (1998).

GATT was originally entered into in 1947 by the United States and 22 other nations. Its principle purpose was the reduction of global trade barriers and, particularly, tariff barriers on trade in goods. Since then, the member states have met periodically to pursue these goals and further reduce trade barriers, and have created an international

organization and body of laws to protect those tariff reductions from erosion and to formalize rules for the regulation of international trade among member states. More than 140 nations are GATT signatories today. From the outset, the United States has been a supporter and leader of GATT and of its efforts to reduce trade barriers around the world.

As Professor Jackson explained, the antidumping laws are a limited exception to the trade liberalization that has been the undisputed goal of GATT and its several rounds of multilateral trade negotiations. That law is not a broad, catch-all provision that may be expanded to protect domestic industry. Rather, it is a narrowly worded statute designed to address carefully circumscribed behavior. It should not be expanded beyond its plain terms to intrude on the general purpose of GATT to reduce barriers to trade.

In furtherance of GATT's primary objective of reducing trade barriers, the member states have amended the agreements permitting imposition of dumping duties, imposing additional limitations on the exception. It is widely recognized that "[t]he Uruguay Round made antidumping and countervailing duty cases more difficult to bring, win, and maintain." *See* Paul C. Rosenthal & Robert T.C. Vermylen, *The WTO Antidumping and Subsidies Agreements: Did the United States Achieve Its Objectives During The Uruguay Round?*, 31 Law & Pol'y Int'l Bus. 871, 885 (2000) (*citing* Michael D. Esch & Daniel E. Waltz, *The Impact of the Uruguay Round Amendments on U.S. Antidumping Law*, 5 Fed. Cir. B.J. 393 (1995)). The amendments reflect that antidumping law applies narrowly to certain specific situations. *See, e.g.*, Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh

Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of Uruguay Round (1994) art. 2.1, 2.4 (requiring antidumping law to apply only after "[a] fair comparison . . . between the export price and the normal value" of a "product"); *see also The Impact of the Uruguay Round Amendments on U.S. Antidumping Law*, 5 Fed. Cir. B.J at 400-418, (explaining some of the additional restrictions imposed by Uruguay antidumping amendments, including sunset provisions to terminate old orders and *de minimis* thresholds for market impact); *see also* H.R. Rep. No. 103-826 at 46 (1994) (stating that one purpose of the amendments to the Antidumping Agreement was to provide "transparency and procedural fairness" and to ensure similar treatment for U.S. and foreign produced goods under the various antidumping laws of the member states).

The express limitations of 19 U.S.C. § 1673 (*e.g.*, to "merchandise" which is "sold" at "less than its fair value") were not an oversight. Rather, they reflect the view that the law is a narrow exception to the overriding U.S. interest in reducing trade barriers and must be carefully tailored to adhere to the United States' international obligations.[13] The statute should be strictly and narrowly construed to fulfill this purpose.

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[13] The same legislative history relied upon by Petitioners lends support to this understanding of the statute's purpose. *See, e.g.*, H.R. Rep. No. 93-571, at 4 (1973) ("H.R. 10710 will permit the United States to continue to exert leadership and new initiatives in international trade policy by recognizing both the overall benefits of continued trade expansion and requisites of equity and safeguards for our producing and consuming interests in international trade.").

## IV. PETITIONERS' COUNTER-TEXTUAL INTERPRETATION OF 19 U.S.C. § 1673 IS NOT IN THE INTERESTS OF THE UNITED STATES

The antidumping law is a carefully worded, unambiguous statute that seeks to address certain well-defined behavior—foreign merchandise that is being sold in the United States at less than fair value. That behavior is not present in the transaction at issue. What is more, imposing dumping duties on uranium enrichment in disregard of the express statutory limitations would have potentially severe public policy repercussions.

Imposing unfounded duties on enrichment services would have an undesirable effect on the market for all stages in the nuclear fuel production chain. The uranium business is characterized by the use of long-term contracts. In entering into these contracts, foreign exporters like Kazatomprom rely on the express language and historical application of U.S. trade laws. A uniform and predictable treatment of those laws is fundamental to these business relationships—for both the exporter and the U.S. utility. Petitioners' unprecedented attempt to apply antidumping law to enrichment services would upset those relationships. If the Government is permitted to distort this plain language, all products from all countries will suddenly become subject to unpredictable outcomes and the whims of an agency instead of the law as drafted by Congress. Indeed, such a result would be particularly troubling with respect to Kazakhstan, the world's most abundant source of uranium, in light of the fact that Kazakh uranium is fairly traded and not subject to dumping

duties.[14] Imposing duties on enrichment would effectively amount to an indirect duty on Kazakhstan's abundant, fairly traded uranium, impairing U.S. utility access to that uranium at a time when the country can least afford it.

In that regard, reversal of the decision below would almost certainly result in higher prices for nuclear fuel, thereby exacerbating the energy crisis the United States is already facing. There is increased agreement among policymakers that nuclear power will be a key part of the United States' energy strategy in the 21st century, given that it offers an economically-viable, low-emission, safe alternative to dependence on fossil fuels.[15] In recognition of these advantages, American lawmakers have demonstrated strong bipartisan support for

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[14] *See supra*, n.2. The determination that Kazakhstan is not dumping is another example of a factor that both U.S. nuclear power companies and Kazakhstan have relied upon. Following that determination, Kazakhstan invested heavily in expanding its uranium mining and production capability. These efforts have been extremely successful, with Kazakhstan poised to become in the very near future the world's single largest supplier of uranium. Indeed, while Kazakhstan provided approximately 3% of the world's mined uranium in 1998, today it provides more than 15%, with a substantial portion of its output consumed in the U.S. market.

[15] *See, e.g.*, Statement of Dennis M. Spurgeon, Assistant Sec'y for Nuclear Energy, Before Sen. Comm. on Energy and Natural Resources (Nov. 14, 2007), http://www.ne.doe.gov/pdfFiles/testimony/Spurgeon_SENR_111407_Final.pdf ("Nuclear power is the only large scale, emissions-free source of baseload electricity currently available capable of meeting the growing demand.") (noting U.S. goal of "expanding the role of nuclear energy as a major component of our Nation's energy picture").

expanding the use of nuclear power.[16] Accordingly, the United States has authorized the construction of twelve new nuclear reactors, and proposals for an additional twenty are being considered by the Nuclear Regulatory Commissioner.[17] Permitting the Petitioners to extend the reach of the antidumping law to uranium enrichment contracts in violation of the unambiguous language of the statute would effectively increase the cost of nuclear fuel, contrary to the long term interests of the United States. *See, e.g., Uranium from Kazakhstan*, Investigation No. 731-TA-539-A (Final), USITC Publ'n No. 3213 (July 1999), at 11 (noting that "the cost of [enriched uranium] fuel assembly rods represents a significant portion of a nuclear power plant's operating expenses").

The only beneficiary of such a wide-ranging and illegitimate tax on U.S. energy consumers would be USEC, one of the Petitioners and the sole enricher of uranium in the United States. Imposing dumping duties on foreign uranium enrichers would shield USEC from international competition and enable it

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[16] *See, e.g.*, Sen. Kay Bailey Hutchison (R-Tex.), Op-Ed, *Texas Can Lead Nuclear Renaissance*, Nueces County (Texas), Record Star, Aug. 15, 2008 ("Nuclear power must play a significant role as America strides toward an energy-efficient and independent future."); Rep. James Clyburn (D-S.C.), *More Drilling Not Long-Term Solution*, The Post and Courier (Charleston, S.C.), July 16, 2008 (noting that as "an unabashed advocate for policies that will end our dependence on foreign oil, enhance our national security, protect our environment and create new economies" the Congressman is "an ardent supporter of expanding our country's nuclear capacity").

[17] *See World Nuclear Power Reactors 2007-08 and Uranium Requirements* (Sept. 1, 2008), http://www.world-nuclear.org/info/reactors.html.

to charge higher prices. USEC and its shareholders, however, would be the only winners in this scenario. Their windfall would come at the expense of U.S. nuclear power companies and the American public – all without a statutorily permissible finding of dumping.

## CONCLUSION

The Department of Commerce has overreached in attempting to apply antidumping law to the service of enriching uranium, adopting an unprecedented interpretation of the statute that is at odds with its text, with its historical application, and with U.S. international obligations. Moreover, this groundless extension of the law would have serious public policy repercussions, including potentially exacerbating an already looming energy crisis in the United States. Such significant harm would be offset by only one dubious advantage: strengthening USEC's monopoly power. The Court should uphold the decision below, thereby leaving to Congress's judgment the issue of whether "protecting" USEC is truly worth the tremendous cost.

The decision below should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

v.

EURODIF S.A., ET AL.

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USEC, INC., ET AL., PETITIONERS

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EURODIF S.A., ET AL.

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**On Writs of Certiorari to the United States Court of Appeals for the Federal Circuit**

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## BRIEF OF PROFESSOR RAJ BHALA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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**On Writs of Certiorari to the United States Court of Appeals for the Federal Circuit**

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## BRIEF OF PROFESSOR RAJ BHALA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICUS CURIAE*[1]

Professor Raj Bhala, the Raymond F. Rice Distinguished Professor at the University of Kansas,

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[1] Pursuant to this Court's Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, amicus curiae states that petitioners and respondents have consented to the filing of this brief. Concurrently with the filing of this brief, letters from petitioners and respondents granting consent to the filing of this amicus brief have been filed with the Clerk.

is an internationally recognized trade-law scholar. He has published a wide array of articles and books regarding international trade law including Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade (Sweet & Maxwell 2005), International Trade Law: Interdisciplinary Theory and Practice (LexisNexis 3d ed. 2008), Dictionary of International Trade Law (2008), and Rethinking Antidumping Law, 29 Geo. Wash. J. Int'l L. & Econ. 1 (1996). Since 2001, he has coauthored an annual review of decisions of the World Trade Organization in the Arizona Journal of International and Comparative Law. He has also worked as an advisor to the United States Department of Commerce and as a consultant to the Governments of Taiwan and Laos as well as to the World Bank and the International Monetary Fund. Professor Bhala is a member of the Council on Foreign Relations and the American Law Institute.

Professor Bhala provides this brief to help the Court understand the global and international-trade-law context of the parties' dispute. An examination and understanding of international obligations and rules strongly counsel in favor of interpreting the antidumping statute not to apply to the sale of services like those at issue in this case. In support of that proposition, Professor Bhala offers the following explanation and analysis relevant to an understanding of the United States' international trade obligations regarding antidumping practices.

## SUMMARY OF ARGUMENT

In the aftermath of World War II, the United States embarked on a project of unprecedented scale—to create an international trade organization and to harmonize trade law for the benefit of all

nations. This led to the 1947 General Agreement on Tariffs and Trade. The 1947 agreement included extensive rules governing the rights of parties to the agreement to take remedial actions against acts of dumping by foreign exporters. The antidumping provisions of the 1947 agreement applied only to the sales of goods. They did not apply to the sales of services.

Almost fifty years later, over 150 nations have entered into the 1994 General Agreement on Tariffs and Trade. The 1994 agreement includes a specific agreement on the implementation of its antidumping provisions. As part of the Uruguay Round of Multilateral Trade Negotiations, GATT's antidumping provisions were changed in various ways that almost uniformly brought GATT and foreign antidumping practices closer to existing United States law. But one aspect of GATT's antidumping provisions that did *not* change was its limitation to sales of goods—it was not extended to the sales of services. In fact, as part of the Uruguay Round, a separate agreement called the General Agreement on Trade in Services was created expressly because the other provisions of GATT did not address the international sale of services.

In this case, however, Petitioners ask the Court to interpret the antidumping statute to allow the United States to impose antidumping duties not only on products sold for less than fair value but also on services sold for less than fair value. But under international trade law, the United States can apply dumping remedies only to the sales of goods, not to the sales of services. Thus, not only does Petitioners' interpretation of the statute conflict with its plain text, it would also, if accepted, place the United

States definitively out of step with its obligations under international trade law. The consequences of such a break with the United States' international obligations regarding trade in services could have significant consequences given that the United States' economy is largely based on the sale of services and its citizens export billions of dollars of services annually.

## ARGUMENT

### I. THE GOVERNMENT CAN IMPOSE ANTIDUMPING DUTIES ONLY WHEN GOODS ARE SOLD FOR LESS THAN FAIR VALUE.

Since 1921, United States law has authorized the imposition of antidumping duties when "foreign *merchandise is being, or is likely to be, sold* in the United States at less than its fair value." 19 U.S.C. §1673(1) (2006) (emphasis added).[2] The antidumping statute's plain language, both in its modern and in its earlier versions, limits the Department of Commerce's authority to impose antidumping duties only when sales of goods are made for less than fair value. *See Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (stating that statutory interpretation "begin[s] with the language of the statute" and goes no further "if the statutory language is unambiguous and the statutory scheme is coherent and consistent") (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

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[2] This language was first adopted in the Anti-Dumping Act, 1921, ch. 14, §201, 42 Stat. 11, which was codified at 19 U.S.C. §160, *et seq.* until 1979. It was subsequently reenacted in 1979 as Title VII of the Tariff Act of 1930, ch. 497, §1, 46 Stat. 590, when it was recodified in its current form.

Section 1673 never mentions or suggests that it covers services, as opposed to goods, sold for less than fair value. Given the statute's plain text referring only to the sale of merchandise, it is understandable why cases interpreting and applying the current and previous versions of the statute address only the sales of goods, not the sales of services. See *SNR Roulements* v. *United States*, 402 F.3d 1358, 1359 (CA Fed. 2005) ("'Dumping' refers to the *sale or likely sale of goods* at less than fair value.") (emphasis added); *Sango Int'l, L.P.* v. *United States*, 484 F.3d 1371, 1372 (CA Fed. 2007) ("The antidumping laws protect United States industries against the *domestic sale of foreign manufactured goods* at prices below the fair market value of those goods in the foreign country.") (emphasis added); *Zenith Elecs. Corp.* v. *United States*, 988 F.2d 1573, 1576 (CA Fed. 1993) ("Dumping is the sale of foreign manufactured goods in this country at less than the fair market value of those goods in the country of manufacture."); *Imbert Imports, Inc.* v. *United States*, 60 C.C.P.A. 123, 124-125, 475 F.2d 1189, 1190 (1973) (stating that antidumping investigation at issue was based on Treasury's allegation that certain cement "was being or was likely to be sold in the United States at less than fair value").

Similarly, the statute's legislative history presents no basis for extending the statute's authorization of antidumping remedies to the sale of services. See S. Rep. No. 96-249, at 15-16 (1979) (stating that under the new antidumping statute based on multilateral trade negotiations, "antidumping duties would be imposed" when it was determined, inter alia, that "a class or kind of merchandise is being or is likely to be sold in the United States at less-than-fair-value"), *as reprinted in* 1979 U.S.C.C.A.N. 381, 401-402.

Further, legislative materials related to the implementation of international obligations indicate that the antidumping statute is not intended to extend to the sales of services. The 1994 Statement of Administrative Action (SAA) regarding the Uruguay Round Agreement Act (implementing the 1994 GATT) describes at length the changes to United States antidumping law necessary to bring it into compliance with the 1994 GATT. H.R. Rep. No. 103-316, Vol. 1, 819-895 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4151-4218. The SAA never suggests that GATT required that either the antidumping statute or Commerce's implementing regulations cover the sales of services. *Id.*; see also H.R. Rep. No. 103-316, Vol. 1 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4050 ("[I]t is the expectation of the Administration that no changes in existing federal law, rules, regulations, or orders other than those specifically indicated in the implementing bill and this Statement will be required to implement the new international obligations that will be assumed by the United States under the Uruguay Round agreements.").[3]

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[3] Commentators comparing the antidumping laws before and after the 1994 GATT never even suggested that the scope of antidumping remedies were expanded to cover the sales of services. See, *e.g.*, Chung, U.S. Antidumping Laws: A Look at the New Legislation, 20 N.C. J. Int'l L. & Com. Reg. 495, 496 (1995) (explaining that the 1994 GATT Antidumping Agreement required only "modest changes to current U.S. antidumping laws" and never suggesting that sales of services were to be covered under United States law).

## II. INTERPRETATION OF THE ANTIDUMPING STATUTE SHOULD BE GUIDED BY THE UNITED STATES' INTERNATIONAL TRADE OBLIGATIONS.

International law is part of United States law. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that "[i]nternational law is part of our law"); see also *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) ("[T]he Court is bound by the law of nations which is a part of the law of the land."). Consistent with this long- established principle, "[a]n Act of [C]ongress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy (Charming Betsy)*, 2 Cranch 64, 118 (1804). Similarly, this Court has interpreted statutes so that they do not conflict with the United States' obligations under treaties. See, *e.g.*, *MacLeod* v. *United States*, 229 U.S. 416, 434 (1913) (construing a tariff-authorizing statute to only authorize duties that were consistent with international law)[4]; *Chew Heong* v. *United States*, 112 U.S. 536, 539-540 (1884) (interpreting statute in a manner that did not conflict with preexisting treaty); cf. *Karnuth* v. *United States ex rel. Albro*, 279 U.S. 231, 235 (1929) ("In reaching that conclusion the court seemed of [the] opinion that, if the statute was so construed as to exclude the aliens, it would be in conflict with article 3 of the Jay Treaty of 1794, a

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[4] See also *MacLeod*, 229 U.S., at 434 ("The statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe, and which were founded upon the principles of international law.").

result, of course, to be avoided if reasonably it could be done.") (internal citation omitted).

For purposes of interpreting 19 U.S.C. §1673(1), the primary sources of international law regarding antidumping law to consider are Article VI of GATT 1994[5] and the Agreement on Implementation of Article VI of GATT 1994.[6] Both of these agreements were implemented under United States law by the Uruguay Round Agreements Act of 1994 (URAA). Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified at 19 U.S.C. §§3501, *et seq.*, plus scattered sections of title 19). Indeed, the URAA approved all multilateral WTO agreements emanating from the 1986–1994 Uruguay Round of multilateral trade negotiations.[7]

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[5] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 108 Stat. 4809, 1867 U.N.T.S. 14, 33 I.L.M. 1125 (1994). The General Agreement on Tariffs and Trade is followed by every major trading nation in the world. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457 (1978).

[6] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 (1994). This is commonly known as the Antidumping Agreement.

[7] Except for certain plurilateral agreements that are not at issue in this case, all WTO agreements arising out of the Uruguay Round were accepted by the United States and other WTO Members as a single undertaking. Both GATT and the Antidumping Agreement are contained in Annex 1A to the Agreement Establishing the World Trade Organization.

The WTO Agreement and the Antidumping Agreement entered into force on January 1, 1995. For overviews of these two accords, see R. Bhala, International Trade Law: Interdisciplinary Theory and Practice 27-32, 35-36 (3d ed. 2008). GATT's 1994 iteration also entered into force on that date. GATT (in its 1947 version) has been in effect since January 1,

Although the *Charming Betsy* doctrine generally requires that statutes be interpreted consistently with international law, the URAA somewhat qualifies this doctrine. The URAA provides that in the event of a conflict between American law and its WTO obligations, the former takes precedence over the latter. 19 U.S.C. §3512(a)(1) ("No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.").[8]

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1948. For a history of GATT, see R. Bhala, Modern GATT Law (2005).

[8] Because of this qualification, scholars and commentators have questioned the applicability of the *Charming Betsy* doctrine in certain cases involving the international trade agreements and agency interpretations of domestic statutes. See Canizares, Comment, Is *Charming Betsy* Losing Her Charm? Interpreting U.S. Statutes Consistently with International Trade Agreements and the *Chevron* Doctrine, 20 Emory Int'l L. Rev. 591 (2006); Nichols, Use of WTO Panel Decisions in Judicial Review of Administrative Action Under U.S. Antidumping Law, 1 Int'l L. & Mgmt. Rev. 237 (2005); Seastrum, *Chevron* Deference and the *Charming Betsy*: Is there a Place for the Schooner in the Standard of Review of Commerce Antidumping and Countervailing Duty Determinations, 13 Fed. Cir. B.J. 229 (2003); Restani & Bloom, Interpreting International Trade Statutes: Is the *Charming Betsy* Sinking?, 24 Fordham Int'l L.J. 1533 (2001); Williams, *Charming Betsy*, *Chevron* and the World Trade Organization: Thoughts on the Interpretive Effect of International Trade Law, 32 Law & Pol'y Int'l Bus. 677 (2001). The Federal Circuit has been inconsistent in its use of the *Charming Betsy* doctrine in antidumping cases. Compare *Corus Staal BV* v. *Dep't of Commerce*, 395 F.3d 1343, 1347-1349 (CA Fed. 2005) (refusing to apply *Charming Betsy* doctrine in antidumping case) with *Allegheny Ludlum Corp.* v. *United States*, 367 F.3d 1339, 1345 (CA Fed. 2004) (applying *Charming Betsy* doctrine in interpreting an antidumping

But the URAA's qualification of *Charming Betsy* does not apply in this case. The President's Statement of Administrative Action that was approved by Congress, states that "[s]ection [3512](a)(1) will not prevent implementation of federal statutes consistently with the Uruguay Round agreements, where permissible under the terms of such statutes." H.R. Rep. No. 103-316, Vol. 1 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4050. In other words, unless the statutory text unambiguously conflicts with GATT or the Antidumping Agreement, §3512(a)(1) does not require the Court to create a conflict between a statute and GATT and thereby put the United States in violation of its international-trade-law obligations. And because Congress approved the SAA, its interpretation of §3512(a)(1) controls. 19 U.S.C. §3512(d) ("The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application."). In fact, it would be contrary to the express provisions of the SAA to construe unnecessarily the antidumping statute to conflict with GATT and the antidumping agreement. The SAA, expressly states that "[t]he implementing bill, including the authority granted to federal agencies to promulgate implementing regulations, is

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statute). But the Court does not need to decide this issue in this case because, as explained above, the qualification is irrelevant given the absence of a conflict between the URAA and the United States' international trade obligations.

intended to bring U.S. law fully into compliance with U.S. obligations under [the Uruguay Round] agreements." H.R. Rep. No. 103-316, Vol. 1 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4050.

Thus, properly construed, §3512(a)(1) requires that the Court apply the *Charming Betsy* principle in this case. As this Court has previously explained, "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995); see also *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164-165 (2004) (explaining that the *Charming Betsy* doctrine "helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world").

## III. INTERNATIONAL TRADE LAW ONLY ALLOWS ANTIDUMPING DUTIES TO BE IMPOSED ON GOODS SOLD FOR LESS THAN FAIR VALUE.

The Respondents' merits brief explains why the transactions at issue—contracts for the sale of uranium-enrichment services that are known as Separative Work Units ("SWU") contracts—are contracts for the sales of services and are not contracts for the sale of goods or merchandise. Eurodif Respondents' Br. 34–52. Given that SWU contracts are contracts for the sales of services, Commerce's proposed interpretation of the antidumping statute in this case is inconsistent with the United States' obligations under GATT 1994 and the Antidumping Agreement.

### A. GATT Article VI Applies Only to the Sales of Goods.

The 1947 General Agreement on Tariffs and Trade was forged in the aftermath of World War II. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. Article VI of the 1947 GATT is the foundation of modern multilateral antidumping law. Specifically, as originally stated in 1947 and as maintained to the present day, Article VI repeatedly and explicitly refers only to the sales of products, not services. For example, paragraph 1 of the article provides that "a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product" is less that certain comparative prices or costs. Art. VI, Para. 1. Similarly, paragraph 7 of Article VI, which describes the effect of certain price-stabilization systems on dumping determinations, expressly refers to the effects of such systems on prices charged on "the sale of the commodity for export." *Id.*, at Para 7.[9] Nowhere in Article VI does the word "service" (or a synonym thereof) appear. Rather, the key and oft-repeated word delineating the scope of application of GATT Article VI is "product" or "commodity."[10]

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[9] Article VI is followed by an Interpretative Note. As with the main text of Article VI, nothing in the Interpretative Note suggests antidumping law applies, or ought to be extended, beyond the realm of sales of products.

[10] Article VI is printed in its entirety in the appendix to this brief. See App. 1a-4a.

The WTO's Appellate Body[11] applies a lexicographic approach, as a necessary and sometimes sufficient methodology, in keeping with the 1969 Vienna Convention on the Law of Treaties.[12] Vienna Convention on the Law of Treaties (Treaty Convention), May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339 (governing the interpretation of treaties and directing courts to look first to the plain language of a treaty when attempting to determine its meaning); see also *United States* v. *Alvarez-Machain*, 504 U.S. 655, 663 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning."). Article 31(1) of the Vienna Convention requires that treaties "be interpreted in good faith in accordance with the ordinary meaning" of the terms of that treaty "in their context and in the light of its object and purpose." 1155 U.N.T.S., at 340.

Following that practice to the present case, nothing in the text of Article VI supports the application of a dumping duty to the sale of a service because the standard lexicographic meaning of "product" does not envision a service. In determining lexicographic

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[11] The Appellate Body is the WTO's highest adjudicatory authority regarding trade disputes. The Appellate Body is charged with determining points of law. It is not authorized to change the rights or obligations of the WTO's member nations.

[12] On the origins, meaning, and use of the Vienna Convention, and its status as both codifying customary international law and contributing to the progressive development of international law, see Stephen C. McCaffrey, Understanding International Law §4.05, at 78-125 (2006); *Mora* v. *New York*, 524 F.3d 183, 196, n.19 (CA2 2008). On how the Appellate Body interprets agreements on trade remedies, including the Antidumping Agreement, see Asif H. Qureshi, Interpreting WTO Agreements—Problems and Perspectives, at 173-180 (2006).

meaning, the Appellate Body consistently and heavily relies on The New Shorter Oxford English Dictionary.[13] The New Shorter OED defines

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[13] For a discussion of WTO litigation, see R. Bhala, International Trade Law: Interdisciplinary Theory and Practice chs. 5-6 (3d ed. 2008).

For discussions of the Appellate Body's use of *The New Shorter OED*, or other editions of the *OED*, in decisions adopted by the WTO Dispute Settlement Body, see Bhala & Gantz, WTO Case Review 2006, 24 Ariz. J. Int'l & Comp. L. 299, 313-316 (2007) (observing the use of *The Concise OED* in an antidumping case, Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6, 2006) (adopted Mar. 24, 2006)); Bhala & Gantz, WTO Case Review 2005, 23 Ariz. J. Int'l & Comp. L. 107, 247 (2006) (discussing the use of *The New Shorter OED* and *The Shorter OED* in Appellate Body Report, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005) (adopted Mar. 21, 2005)); Bhala & Gantz, WTO Case Review 2004, 22 Ariz. J. Int'l & Comp. L. 99, 136-137, 158-159 (2005) (concerning use of *The Shorter OED* in Appellate Body Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R (Aug. 30, 2004) (adopted Sept. 27, 2004), and in Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, (Apr. 7, 2004) (adopted Apr. 20, 2004)); Bhala & Gantz, WTO Case Review 2003, 21 Ariz. J. Int'l & Comp. L. 317, 342 (2004) (noting the use of the *New Shorter OED* in an antidumping case involving the United States, Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003) (adopted Jan. 27, 2003)); Bhala & Gantz, WTO Case Review 2001, 19 Ariz. J. Int'l & Comp. L. 457, 500, 502, 535, 550, 584 (2002) (commenting on the use of the *New Shorter OED* (1993), and the *Concise OED* (1995), in Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, WT/DS161/1, WT/DS169/1 (adopted Jan. 10, 2001), noting the use of an *OED* edition in an antidumping case Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R

"product" in three contexts, the first and third of which, mathematics and chemistry, respectively, are irrelevant to this case. In the second context, which is the broadest of the three and covers the ordinary meaning of the noun, The New Shorter OED says:

> "Product . . . 2 A thing produced by an action, operation, or natural process; a result, a consequence; spec. that which is produced commercially for sale. Also, (agricultural) produce. LI6 . . . b. A quantity; a supply, a stock. rare. MI7-MI8. c. The value of goods produced. LI9. . . ."[14]

That The New Shorter OED's definition of "product" does not envision intangible things like services is further demonstrated by its reference to the definition of the verb "produce." The New Shorter OED states:

> "Produce . . . 3 . . . c. Of a country, region, process, etc.: yield or supply (a commodity etc.). LI6. d. Compose, make or bring into existence by mental or physical labor (a material object). MI7. . ."[15]

Construing Article VI to also encompass sales of services would stretch the meaning of the word "product" rather uncomfortably beyond what it is ordinarily understood to mean in the context of

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(Mar. 1, 2001) (adopted Mar. 12, 2001), describing the use of the *New Shorter OED* in Appellate Body Report, *United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (Jul. 24, 2001) (adopted Aug. 23, 2001)).

[14] *The New Shorter OED*, at 2367.

[15] *The New Shorter OED*, at 2367 (emphasis added).

international trade law—a good, or equivalently, an item of merchandise. Thus, the explicit references throughout Article VI that relate to the sales of products are not properly construed to also cover the sales of services.

### B. Neither GATT Jurisprudence Nor the URAA's Legislative History Support The Application of Antidumping Law to the Sale of Services.

Stretching the word "product" to cover both goods and services becomes more uncomfortable in the environment of antidumping law and GATT Article VI. The WTO Appellate Body routinely follows Article 31(1) of the Vienna Convention. If the Appellate Body's lexicographic analysis of a key term left room for maneuver, then it would look to the context of the terms, and the object and purpose of the international agreement in which the term is used.

Performing a full-blown replication of the rest of a possible WTO Appellate Body examination is unnecessary for present purposes. Rather, it suffices to outline, based on extensive past reported decisions, how the Appellate Body would proceed if it sought to buttress the lexicographic analysis. It would examine the context of "product" in GATT generally and Article VI specifically and review of the object and purposes of GATT (especially as laid out in the Preamble to GATT). Doubtless, this process would yield the conclusion that "product" in Article VI is essentially synonymous with "good" or "merchandise." Thereafter, the Appellate Body would be inclined to offer two further points, as yet more support for the ordinary meaning of "product" in Article VI: past jurisprudence and legislative

history. Neither supports the application of antidumping law to the sale of services.

First, in the history of GATT jurisprudence before the advent of the WTO and its Appellate Body on January 1, 1995, no antidumping case ever applied an antidumping remedy to the sale of services.[16] That is for good reason. Until 1995, multilateral trade law did not even encompass services. Thus, no GATT panel operating under pre-WTO dispute settlement procedures would, or could, have contemplated stretching the meaning of "product" to cover services under Article VI.

Second, the official contemporaneous records of the United States during the 1946-47 negotiations of GATT do not indicate any intention by GATT's drafters to apply Article VI to the sale of services. The United States' and the United Kingdom's 1945 Proposal on World Trade and Employment, which lays out the vision for GATT, repeatedly refers to GATT's purposes in the context of the sale of goods.[17] Similarly, neither the 1946 Suggested Charter for an International Trade Organization, which elaborates on the 1945 Proposal[18]; the 1947 Analysis of GATT,

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[16] See R. Bhala, Modern GATT Law ch. 25, ¶¶ 25-020–25-024 at 694-697 (discussing antidumping cases in early GATT history).

[17] See Proposal on World Trade and Employment—Joint Statement by the United States and United Kingdom and Proposals for Expansion of World Trade and Employment, DEP'T ST. BULL., Dec. 9, 1945, 912-929.

[18] SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS, Dep't of State Publication No. 2598, Commercial Policy Series 98, Sept. 1946, 5-6.

which explains what GATT means[19]; nor the 1947 Geneva Charter for an International Trade Organization—A Commentary, which summarizes the negotiating history and the Charter for an International Trade Organization[20]; suggests either that the United States or its negotiating partners who drafted GATT sought to create a text that might one day allow for the application of antidumping law to the international sale of services.

### C. The WTO Antidumping Agreement Covers the Sale of Goods Alone.

The argument concerning GATT Article VI applies in nearly parallel fashion to the Antidumping Agreement, which consistently refers to the sale of a "product."[21] As in Article VI of GATT, the ordinary meaning of that term as used in the Antidumping Agreement does not encompass the sale of services. The word "service" never appears in the Antidumping Agreement. Moreover, the use of the word "product," and the absence of the word "service," in the agreement is not surprising. The Uruguay Round negotiators set out, and succeeded in, elaborating on the rules of Article VI. Indeed, the full, formal title of the agreement explicitly refers to Article VI.

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[19] ANALYSIS OF GENERAL AGREEMENT ON TARIFFS AND TRADE, Dep't of State Publication No. 2983, Commercial Policy Series 1947, 4-194 (laying out the concessions the United States obtained from other countries on trade in goods); *id.*, at 197 (commenting on the abuse of antidumping law).

[20] THE GENEVA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION—A COMMENTARY, Dep't of State Publication No. 2950, Commercial Policy Series 107, 1947 (all of which is set in the context of the trade of products).

[21] The Antidumping Agreement is available at http://www.wto.org/english/docs_e/legal_e/19-adp.pdf.

Three further points support the ordinary meaning of the word "product" as used in the Antidumping Agreement: recent jurisprudence, Uruguay Round negotiating history, and Uruguay Round legislative history. First, in the entire history of WTO jurisprudence, which began January 1, 1995, no antidumping case ever applied antidumping remedies to the sale of a service. That hardly is for want of cases. To the contrary, the WTO Appellate Body has adjudicated a large number of antidumping controversies.[22]

Second, the history of the Uruguay Round negotiations evinces no intention on the part of the negotiators of the Antidumping Agreement to apply that Agreement to services. There is no indication they sought to frame a text with the flexibility so that it might one day allow for this possibility. To the contrary, all arrows point to the application of the antidumping remedy only to sales of goods.[23]

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[22] The full listing of Appellate Body cases, by subject matter (as well as countries and years), is available at the WTO's website, www.wto.org.

[23] For example, the WTO Secretariat's Guide to the Uruguay Round Agreements clearly identifies only the sales of "goods" as the target for antidumping actions. WTO Secretariat, Guide to the Uruguay Round Agreements 80-89 (1999). Similarly, an exhaustive four-volume history of the Uruguay Round negotiations, authored and edited by a long-time and distinguished American trade-law practitioner, never even suggests that any provisions in any of the drafts of the antidumping agreement, let alone the final document, showed an intent to expand the scope of coverage of antidumping law beyond the sales of goods. See T. Stewart et al., II The GATT Uruguay Round—A Negotiating History (1986-1992) 1383-1710 (Terence P. Stewart ed., 1993).

Third, the legislative history in the United States to the URAA—the Statement of Administrative Action (SAA) says nothing about the application of antidumping law to services.[24] The SAA is—as a legal matter—the definitive legislative history to the URAA.[25] It was filed by the Clinton Administration when seeking Congressional passage of the URAA. Nothing in the SAA on the Antidumping Agreement remotely suggests that the government believed that agreement applied, or could be extended, to cover the sales of services.

The SAA's discussion of antidumping law focuses on remedies for allegedly dumped imports—*i.e.*, products sold by foreign exporters to customers in the United States. For example, the SAA explains how, when calculating a dumping margin, to account for profits, and certain expenses, associated with them as sold in an importing country vis-à-vis profits and expenses associated with sales of a foreign like product in an exporter's home market.[26] The goal is to get a fair comparison of the export (or constructed export) price and normal value, *i.e.*, what is known in the trade-law community as an apples-to-apples comparison of the price of allegedly dumped merchandise against home market sales. This analysis, as described in the SAA, makes sense only in the context of sales of goods.

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[24] H.R. Rep. No. 103-316, Vol. 1, at 807-895 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4040-4412.

[25] That is because, as set out at the start of the URAA itself, Congress approved the SAA. See 19 U.S.C. §3511(a)(2).

[26] H.R. Rep. No. 103-316, Vol. 1, at 807, 809 (1994), as reprinted in 1994 U.S.C.C.A.N. 4040, 4151-4153.

### D. GATS Is Deliberately and Meaningfully Distinct From the Antidumping Agreement.

The separate placement of the antidumping agreement and General Agreement on Trade in Services (GATS) within the grand scheme of multilateral trade law further reinforces the point that sales of services are not covered by antidumping law.[27] Both are in Annexes to the WTO Agreement, but each is in an entirely distinct Annex. The antidumping agreement appears in Annex 1A to the WTO Agreement, which is entitled "Multilateral Trade Agreements on Goods." It contains thirteen such agreements, including GATT 1994, which incorporates by reference the entire 1947 GATT text and the Agreement on Implementation of Article VI of GATT 1994. These agreements are monitored and administered by a WTO Council on Goods. In contrast, GATS is in Annex 1B, and is reviewed by a Council on Services.[28]

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[27] GATS is published on the WTO website, www.wto.org, and reprinted in a variety of sources, including R. Bhala, Documents Supplement for International Trade Law: Interdisciplinary Theory and Practice, Document 29, 489-522 (3d ed. 2008).

[28] GATS defines "trade in services" to mean "the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) *in the territory of one Member to the service consumer of any other Member*; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member." General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1167 (1994) (emphasis added).

Overall, the structure of multilateral trade law is logical and straightforward. The WTO Agreement is the umbrella document. It establishes the WTO as an institution, and, *inter alia*, explains key points about membership in that international body. The logic of this structure is simple: three things are traded across borders—goods, services, and intellectual property. Thus, regulations governing the importation and exportation of goods, services, and IP are set out in Annex 1. That Annex is subdivided along the lines of what is traded. As just explained, Annex 1A covers sales of goods and Annex 1B covers sales of services. Intellectual property is covered by Annex 1C.

While various accords in Annexes 1A, 1B, and 1C do refer to one another, they are designed to be largely self-contained and mutually exclusive. Notably, there is no reference in the antidumping agreement to GATS, nor any reference in GATS to the antidumping agreement. That is, there is no indication in either the antidumping agreement or GATS that sales of services, regulated by GATS, are susceptible to the trade remedy of an antidumping action.

### E. Applying Antidumping Law To Sales of Services Would Be Problematic.

Petitioners' argument that antidumping law can be applied to transactions involving the sale of services, if accepted, would likely lead to very significant problems regarding how to classify domestic and foreign services for purposes of comparing them in

order to determine whether a dumping remedy should be imposed.[29]

One important reason why international obligations on antidumping law do not apply to the sales of services arises from the different ways services are traded, classified, and compared. Goods move across borders in physical form, and are classified according to roughly 8,000 standard product categories and sub-categories (using 4- and 6-numerical digit classifications, respectively) in the Harmonized System.[30] The World Customs Organization administers and refines the Harmonized System. There is a long history of GATT and WTO jurisprudence on discerning whether a product sold into a domestic market by a foreign exporter (such as an allegedly dumped good) is "like" a domestic product (that the imported product, if dumped, allegedly injures or threatens with injury). The key cases are the 1970 GATT Working Party Report in Border Tax Adjustments and the 1996 Japan Alcoholic Beverages and 2004 Asbestos decisions of the WTO Appellate Body.[31] Essentially,

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[29] As noted by Respondent Ad Hoc Utilities Group, uranium-enrichment services are categorized as services that are governed by GATS, which does not provide an antidumping remedy. See Ad Hoc Utilities Group Respondent's Br. 48 n.32. The problems that would be created with respect to how to classify services for antidumping law purposes are described to inform the Court of the practical problems that could arise if the Petitioners' argument is accepted.

[30] See R. Bhala, International Trade Law: Interdisciplinary Theory and Practice ch. 17 at 523-532 (3d ed. 2008).

[31] See Report of the GATT Working Party, *Border Tax Adjustments*, ¶18L/3464 GATT B.I.S.D. (18th Supp.) at 97 (1972); Appellate Body Report, *Japan—Taxes on Alcoholic Beverages* §H.1(a) (WT/DS8/AB/R, WT/DS10/AB/R, and

they stand for the proposition that products are tested for "likeness" based on their physical characteristics, end uses, and consumer behavior. None of these cases involved antidumping law, but the test for "likeness" they articulate is used in the context of trade remedies.

The world of services is very different. Services are sold across international boundaries in four ways, called "modes:" cross-border supply, consumption abroad, commercial presence (*i.e.*, foreign direct investment), and temporary movement of persons (*i.e.*, immigration).[32] There is no definitive system for classifying all service sectors, sub-sectors, and sub-sub-sectors. During the Uruguay Round, negotiators agreed on an inchoate scheme created through research conducted by the United Nations, GATT, and WTO Secretariats. That scheme is still in use.[33]

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WT/DS11/AB/R) (Oct. 4, 1996) (adopted Nov. 1, 1996); Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶134-148, WT/DS135/AB/R (adopted Mar. 12, 2001). *See also* R. Bhala, Modern GATT Law ch. 1 ¶¶1-026–1-031 at 19-22 (2005) (discussing these and related cases).

[32] See R. Bhala, International Trade Law: Interdisciplinary Theory and Practice ch. 47, at 1541-1551 (3d ed. 2008).

[33] See R. Bhala, International Trade Law: Interdisciplinary Theory and Practice ch. 47, at 1551-1554 (3d ed. 2008).

There are two key documents in services trade classification, (1) the WTO Services Sector Classification List, or "W120," and (2) the imprudently titled United Nations Central Product Classification ("CPC") List. The W120 identifies 11 standard service sectors (and a range of sub-sectors and sub-sub-sectors), and is based on the CPC List. Use of the word "Product" in the rubric of the latter document perhaps may be explained by haste. The United Nations still had not completed the list when formal negotiations in the Uruguay Round ended in December 1993.

The WTO Appellate Body's decisions on whether services provided by foreign service suppliers are "like" a service sold by a domestic supplier have barely begun to evolve. There are few cases addressing the issue. Of the existing cases, one involves services supplied in connection with bananas, and another concerns on-line gambling.[34] Neither of these Appellate Body reports has developed a mature test on comparing foreign and domestic services.

Antidumping law rests firmly on the ability to compare and contrast "like" products. Only if dumped merchandise injures (or threatens with injury) a "like" good produced domestically is imposition of an antidumping duty lawful under international and United States law. Without a mature test for differentiating "like" from "unlike" services, applying antidumping law to the sale of services likely would be highly problematical—potentially unjustly over-inclusive in some cases, and under-inclusive in other cases. And this is not an insignificant problem because determining whether or not different products are "like" lies at the very core of antidumping law.

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[34] See, respectively, Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted Sept. 25, 1997), and Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (adopted Apr. 20, 2005).

## IV. Doha Round Negotiations Do Not Contemplate the Future Application of Antidumping Law to the Sale of Services.

The new round of multilateral trade negotiations—the Doha Development Agenda, known more commonly as the Doha round—was launched in Doha, Qatar in November 2001.[35] The WTO Doha Ministerial Conference Declaration establishing the DDA provides a mandate for trade negotiators representing the now 152 nations that are WTO members. Paragraph 15 of the Doha Agenda calls on the WTO's members to offer each other improved market access on services, through all four modes of delivery. The mandate (in Paragraph 28) also urges them to "clarify[] and improve[] disciplines" on antidumping law. The DDA never remotely intimates that WTO Members negotiate with a view to expanding trade remedies, such as antidumping law, to encompass services.

The Doha round negotiations have dragged on for seven years. At no point during the Round has the expansion of antidumping law to cover services entered into any of the draft negotiating texts prepared by the appropriate negotiating committee chairman. Indeed, the topic simply has not been part of any serious proposal from any major Member (if any proposal from any Member at all). Thus, the latest draft negotiating text, issued by the chairman in May 2008, covers a vast array of antidumping issues, but assuredly not the application of

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[35] The Doha Agenda is published on the WTO website, www.wto.org, and reprinted in a variety of sources, including R. Bhala, Documents Supplement for International Trade Law: Interdisciplinary Theory and Practice, Document 35, 633-645 (3d ed. 2008).

antidumping duties to services. Notably, however, a small part of the services negotiations cover the possible creation of a brand new trade remedy for services—a special services safeguard. That the Doha Round participants have discussed creating this new remedy further shows that the participants do not, and have not, intended for the broader antidumping remedy to apply to the sales of services.

To be sure, the Doha round has yet to conclude successfully. Whether it will is uncertain. Talks remain mired in issues unrelated to the present case, particularly reductions to agricultural tariffs and subsidies, and non-agricultural market access. Nevertheless, given recent negotiating history, it would be shocking if the Doha round concluded with an agreement to apply conventional antidumping rules to sales of services. As things currently stand, there is no reason to think that international law on antidumping is evolving in the foreseeable future to include the sale of services in its scope. For Commerce to apply domestic antidumping law to the sale of services would be incongruous with the direction of multilateral trade negotiations.

Commerce's imposition of antidumping duties on transactions involving the sale of services could also complicate further the conclusion of the Doha round of negotiations. The United States has already injected tremendous controversy into the Doha round because of Commerce's use of a particular methodology called "zeroing" when calculating dumping margins.[36] The United States has lost every

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[36] "Zeroing" is defined in R. Bhala, Dictionary of International Trade Law 529, 534-535 (2008) (table following entry on "zeroing"). For further elaboration of the methodology, see, *e.g.*,

zeroing case at the WTO.[37] Because Congress has not amended the antidumping statute to conform with the WTO Appellate Body's rulings, the Federal Circuit has held it cannot order Commerce to cease its use of the methodology.[38] The American negotiating team in the Doha round insists that the Appellate Body's rulings must be overturned in the round so that Commerce's zeroing methodology is legitimated under the antidumping agreement. Given the immense controversy the United States has already created because of Commerce's decision regarding zeroing, any construction of the antidumping statute to cover the sales of services holds the potential to make these negotiations even more complicated.

## V. Applying Antidumping Law to Services Would Risk Retaliation by Foreign Governments Against American Service Providers.

In addition to the textual reasons why GATT Article VI and the antidumping agreement do not apply to the sale of services, there is also a policy rationale. If Commerce were authorized to apply American antidumping law to services, in breach of America's international-trade-law obligations, then antidumping authorities in other WTO Members might follow suit. Were they to do so, important

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R. Bhala, International Trade Law: Interdisciplinary Theory and Practice 1023-1036 (3d ed. 2008).

[37] These cases are listed and summarized in R. Bhala, Dictionary of International Trade Law 530-534 (2008) (table following entry on "zeroing").

[38] See, *e.g.*, *Timken Co.* v. *United States*, 354 F.3d 1334, 1347 (CA Fed. 2004).

economic interests of the United States—far beyond any narrow sector like uranium enrichment—would be compromised.

America is a service-oriented economy, and indeed the pre-eminent such power in the world. Roughly seventy to eighty percent of the gross domestic product of the United States is accounted for by services. And approximately eight of ten Americans are employed in service industries. For all the attention the business, financial, and political media give to the large and seemingly endless American trade deficit, little coverage is given to the fact the United States has a surplus in services trade with the rest of the world. American architects, bankers, broker-dealers, doctors and health care workers, educators, engineers, fund managers, insurance experts, investment analysts, lawyers, researchers, tourism and travel professionals, and other service providers export their services to foreign nationals around the world. Indeed, many of them anticipate—or at least hope for—enhanced market access for their services through a successful Doha Round conclusion.

If Commerce is permitted to apply antidumping law to the sales of services, any short-term gains for petitioners in this particular antidumping action might be wiped out by the long-term vulnerability American service exporters incur. Dozens of WTO Members have developed the practical legal capacity to bring antidumping actions, in accordance with GATT Article VI and the antidumping agreement, against foreign producers and exporters of goods. Those countries include China, India, Mexico, Brazil, and other significant (in terms of value and volume) markets like the European Union, for present and

hoped-for future American service providers. If Commerce's approach in this case became contagious, then American service providers would be prominent targets of foreign antidumping actions. In turn, if foreign governments imposed antidumping duties on these providers, it would have negative effects for American output, employment, and export performance.

## CONCLUSION

For the foregoing reasons, the international-trade-law obligations incumbent on the United States concerning antidumping duties do not apply to the sale of services. Because, as explained in Respondents' brief, uranium-enrichment contracts involves the sale of services, then the United States' international obligations under GATT Article VI and the WTO antidumping agreement are inapplicable to uranium-enrichment contracts. In turn, application by Commerce of American antidumping law to enrichment contracts would be contrary to the United States' obligations under international trade law.

Respectfully submitted,

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# APPENDIX

## *Article VI*

### *Anti-dumping and Countervailing Duties*

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

*(a)* is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

*(b)* in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (*a*) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(*b*) The CONTRACTING PARTIES may waive the requirement of subparagraph (*a*) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of subparagraph (*a*) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.*

(*c*) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in subparagraph (*b*) of this paragraph without the prior approval of the CONTRACTING PARTIES; *Provided* that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

7. A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

(*a*) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

(*b*) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

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IN THE

# Supreme Court of the United States

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UNITED STATES OF AMERICA,
*Petitioner,*

v.

EURODIF S.A., ET AL.,
*Respondents,*

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USEC, INC., ET AL.,
*Petitioners,*

v.

EURODIF S.A., ET AL.,
*Respondents.*

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**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

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## BRIEF OF TECHSNABEXPORT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## BRIEF OF TECHSNABEXPORT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Amicus *curiae* Techsnabexport ("Tenex") respectfully submits this brief in support of respondents in this case.[1]

## INTEREST OF *AMICUS CURIAE*

*Amicus curiae* Tenex exports uranium products and uranium downblending and enrichment services from Russia. Tenex is also the agent of the Russian Federation's State Atomic Energy Corporation, Rosatom ("Rosatom"), the Executive Agent of the Russian Government under the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons ("HEU Agreement").[2] Tenex is filing this brief because it has an interest in ensuring that the Court has a proper understanding of the HEU Agreement, the agreement that suspended the 1992 antidumping investigation of uranium from Russia,[3] and uranium market conditions.[4]

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[1] Pursuant to Rule 37.6 of this Court, Tenex states that no counsel for a party authored this brief in whole or in part, and no person, other than Tenex, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

[2] Feb. 18, 1993, Hein's No. KAV 3503, State Dep't No. 93-59, 1993 WL 152921. The Russian Ministry of Atomic Energy ("Minatom") was the original signatory to the HEU Agreement and was initially designated by the Russian Government as the Executive Agent with authority for implementation of the Agreement.

[3] *Antidumping; Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan; Suspension of Investi-*

(Continued)

## SUMMARY OF ARGUMENT

The view that the Federal Circuit's interpretation of 19 U.S.C. § 1673 would compromise U.S. foreign policy, national security and energy policy objectives by giving Russia incentives to scale back plans to downblend highly enriched uranium ("HEU") and saturate the U.S. market instead with low-enriched uranium ("LEU") manufactured through conventional enrichment is both legally irrelevant to this case and factually wrong. Tenex has no incentive to stop downblending HEU under the HEU Agreement in favor of conventional LEU production pursuant to separative work unit ("SWU") contracts.

As an initial matter, the Court's disposition of this case could have *at most* only minor, short-term effects on the HEU Agreement with Russia. That Agreement, which commenced in 1993, is nearing the end of its life and terminates in five years. That is

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(Continued)

*gations and Amendment of Preliminary Determinations*, 57 Fed. Reg. 49220 (Dep't of Commerce Oct. 30, 1992), and the amendments thereto ("Suspension Agreement"). Rosatom is the successor-in-interest to Minatom, the original party to the Suspension Agreement with the Department of Commerce.

[*] *Amicus* Tenex presents in this brief facts in support of its arguments and respondents' position. The General Director of Tenex certifies that the information contained in this brief is, to the best of his knowledge, complete and accurate. *See e.g.*, 19 C.F.R. §351.303(g) (the Department of Commerce's antidumping regulations requiring "with each submission containing factual information" the following certification from "the person officially responsible for presentation of the factual information: I, (name and title), currently employed by (person), certify that (1) I have read the attached submission, and (2) the information contained in this submission is, to the best of my knowledge, complete and accurate.")

a very short period within the context of the international uranium market. Most U.S. utilities have already locked into long-term purchase agreements that cover most of their requirements within or even beyond the remaining term of the HEU Agreement. Moreover, the United States Enrichment Corporation ("USEC") controls the distribution of SWU from the HEU Agreement by deciding whether its existing long-term contracts with U.S. and foreign utilities will be supplied using SWU obtained under the HEU Agreement or SWU from other sources (*i.e.*, self-production or stockpile). Because of commitments under long-term contracts, the available uncovered demand from U.S. utilities is limited. Hence, existing long-term contracts greatly diminish any incentive Russia might otherwise have to abandon HEU downblending and the transactions associated with the HEU Agreement in favor of commercial contracts for uranium enrichment.

In any event, even if the HEU Agreement were *not* approaching the end of its term, Tenex still would have no clear incentive to divert even a portion of its current HEU Agreement transactions with USEC to potential commercial SWU transactions. The current price formula by which USEC pays Tenex for SWU under the HEU Agreement is derived from a calculation of published market price indicators. Tenex has every incentive to maximize the market value of the HEU Agreement transactions rather than risk exporting LEU directly to U.S. customers in a manner that would drive down market prices and thereby undercut revenue from the HEU Agreement transactions. Exporting LEU to the United States in quantities and at prices that would disrupt the U.S. market also would be contrary to Russia's interests in con-

tinued cooperation with the United States on peaceful nuclear energy issues.

Finally, also overstated is the potential threat that Russia could saturate the U.S. market with LEU. Russia's enrichment capacity is substantially committed to existing long-term contracts and increasing demand for Russian enrichment services. Demand for Russian LEU continues to grow in Russia and in third-country markets at a rate far exceeding that of the U.S. market. Concerns about Tenex diverting its enrichment capacity to supply the U.S. market also cannot be reconciled with the recent amendment to the Suspension Agreement. Under that amendment, Russia agreed to export limits equal to about twenty percent of U.S. market demand for the period 2014 to 2020.

## FACTUAL BACKGROUND

### I. The U.S.-Russia HEU Agreement

The United States and the Russian Federation concluded the HEU Agreement on February 18, 1993. HEU Agreement, *supra* note 2. The Recitals of the HEU Agreement reflect a mutual desire of both the United States and the Russian Federation "to arrange the safe and prompt disposition for peaceful purposes of highly enriched uranium extracted from nuclear weapons resulting from the reduction of nuclear weapons in accordance with existing agreements in the area of arms control and disarmament." The Agreement provides that, over a 20 year period between 1993 and 2013, Russia will "downblend" the HEU in the warheads of approximately 20,000 Soviet-era nuclear weapons and sell SWU, which will be used by electricity-producing nuclear plants. HEU

Agreement, Article I(1).[5] Under the terms of the HEU Agreement, "[e]ach Party shall have the right to terminate this Agreement upon twelve months written notification to the other Party." HEU Agreement, Article VI(3).

The Parties further specified their respective rights and obligations pursuant to the HEU Agreement in the Implementing Contract to the HEU Agreement.[6] In September 1996, the Implementing Contract was amended to give effect to the USEC Privatization Act.[7] Amendment No. 008 provided that USEC would purchase SWU only from Tenex.[8] Tenex would

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[5] Each Government designated an "Executive Agent" to implement the HEU Agreement: For the United States, the Executive Agent was initially the U.S. Department of Energy ("DOE"); for Russia, the Executive Agent was initially Minatom. HEU Agreement, Article III. The United States subsequently designated USEC as its Executive Agent, in place of the DOE. USEC was then wholly-owned by the U.S. Government. USEC was privatized in 1998, pursuant to the USEC Privatization Act, 42 U.S.C. § 2297h *et seq*. The Government of the Russian Federation subsequently appointed Tenex to act as Minatom's agent, acting on its own behalf but at the direction of and in the interest of Minatom, for the purposes of performing Minatom's obligations as Executive Agent for the implementation the HEU Agreement.

[6] Initial Implementing Contract for the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons ("Implementing Contract"), executed on January 14, 1994.

[7] The USEC Privatization Act privatized USEC and established the annual amount of natural uranium that can be sold in the United States pursuant to the HEU Agreement transactions. 42 U.S.C. § 2297h *et seq*.

[8] The Implementing Contract originally provided that USEC would purchase the natural uranium component as well as the

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deliver LEU to USEC, but simultaneous with this delivery, USEC would deliver to Tenex's account (by book transfer) natural uranium that was deemed of Russian origin and of an amount equal to the natural uranium component of the LEU delivered by Tenex to USEC.

Given that USEC's delivery of the deemed-Russian natural uranium occurred at the same time as Tenex's delivery of LEU to USEC, and payment under Amendment No. 008 is designated for SWU only, USEC was paying only for the SWU component of the delivered LEU. Implementing Contract, Amendment No. 008, Sections 2(a) and 2(d). The Russian-origin natural uranium could be sold in the U.S. market pursuant to annual quota limits set forth in the USEC Privatization Act. 42 U.S.C. § 2297h-10(b)(5). Russia, however, has not sold to the U.S. market the maximum amounts of natural uranium permitted under this quota because of its obligation to down-

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SWU component of the LEU derived from HEU. Complications related to the terms of compensation for the natural uranium component of LEU delivered in the early years of the HEU Agreement led to the renegotiation of the terms of sale. Under Amendment No. 008, USEC no longer had any obligation to pay for the natural uranium component of any LEU delivered by Tenex pursuant to the HEU Agreement transactions. Amendment No. 008, dated September 4, 1996, to the Implementing Contract for the Agreement Between the Government of the United States of America and the Government of the Russian Federation concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons, executed on January 14, 1994, Section 2(a) ("USEC shall have no obligation to pay for the natural uranium component of any LEU delivered after calendar year 1996.").

blend HEU and deliver LEU to the United States in accordance with the terms of the HEU Agreement.[9]

USEC estimates that the HEU Agreement program will result in payments of approximately $8 billion by USEC to Tenex for SWU over the 20-year life of the

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[9] Tenex retained a portion of this return natural uranium feed, while another portion was sold to Cameco, Cogema (now Areva), and Nukem (collectively "the Western Companies") pursuant to the March 1999 Commercial Feed Agreement. In June 2004, Tenex and the three Western Companies announced an amendment to the Commercial Feed Agreement whereby the Western Companies waived options to purchase the HEU return feed in order to ensure that Russia would have sufficient natural uranium to blend down HEU for the remaining term of the HEU Agreement. U.S. Department of Energy, *Report on the Effect the Low-Enriched Uranium Delivered Under the HEU Agreement Between the Government of the United States and the Government of the Russian Federation has on the Domestic Uranium Mining, Conversion, and Enrichment* Industries *and the Operation of the Gaseous Diffusion Plant*, at 4 (Dec. 31, 2004) (*"DOE 2004 HEU Agreement Effects Report"*) (stating that the HEU Commercial Feed Agreement was amended to ensure Russia had sufficient uranium to meet its obligations under the HEU Agreement to blend down weapon-grade HEU and "in light of Russia's rising requirements for uranium to fuel their expanding nuclear plant construction program within Russia and abroad"), *available at* http://www.ne.doe.gov/pdfFiles /RptEffectLow-Enriched%20 UraniumDec312004.pdf); *see also* News Release, Cameco, Cameco Provides Details of Previously Announced Uranium Agreement: Companies Amend Deal for Uranium from Dismantled Russian Nuclear Weapons (Jun. 16, 2004) (stating that the Western companies waived their option rights to purchase uranium returned to Russia pursuant to and for the remainder of the HEU Agreement, effectively withholding for Russia's use 74 million pounds of uranium that otherwise could have been sold to the Western companies), *available at* http://www.cameco.com/media_gateway/news_releases/2004/news_release.php?id=85.

HEU Agreement.[10] Through 2006, the Department of Energy reported that 53.4 million SWU had been purchased, which had been derived from approximately 11,673 dismantled warheads, generating 292 metric tons of HEU.[11] For the remainder of the term of the HEU Agreement, Russia will sell 5.5 million SWU annually to USEC, *see* USEC Inc. News Release, which represents approximately 40 percent of the estimated U.S. annual SWU requirements of almost 14 million SWU. *DOE 2006 HEU Agreement Effects Report* at 6 (reporting that U.S. demand for 2006 is estimated to be nearly 14 million SWU). The DOE report noted that SWU prices in 2006 started the year at $116 per SWU and had increased over 15 percent to $135 per SWU by the end of the year. *Id.* For 2007, the reported month-end price range for SWU ranged from $128 to $143 per SWU.[12]

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[10] News Release, USEC Inc., Governments Approve New USEC-Russian Agreement; U.S. and Russia Approve New Market-based Pricing Terms to Convert Warheads to Nuclear Fuel (June 19, 2002) ("USEC Inc. News Release"), *available at* http://findarticles.com/p/articles/mi_m0EIN/is_2002_June_19/ai_87452712.

[11] U.S. Department of Energy, *Report on the Effect the Low Enriched Uranium Delivered Under the Highly Enriched Uranium Agreement Between the Government of the United States and the Government of the Russian Federation has on the Domestic Uranium Mining, Conversion, and Enrichment Industries and the Operation of the Gaseous Diffusion Plant* at 2 (December 31, 2006) ("*DOE 2006 HEU Agreement Effects Report*"), *available at* http://www.ne.doe.gov/pdfFiles/2006_HeuReport.pdf .

[12] NUCLEAR FUEL, *Secondary SWU Market Price Estimate (US$/SWU)*(Platts/McGraw Hill Companies, New York, N.Y.), Vol. 32, No. 4, Feb. 12, 2007 and Vol. 33, No. 2, Jan. 28, 2008 (reporting $128-$143 per SWU (Trade Tech) and $135-$143 per SWU (Ux Consulting) for 2007).

In June 2002, the Implementing Contract between USEC and Tenex was amended again to provide for a market-based pricing structure for the SWU purchased by USEC for the remaining term of the HEU Agreement (*i.e.*, through 2013).[13] Previously, USEC had purchased SWU from Tenex pursuant to a price escalation formula for a specified period. Under the new SWU pricing terms, USEC's purchase price was calculated using a discount from an index of published market price indices widely used in industry practice. Because the current price formula by which USEC pays Tenex for SWU under the HEU Agreement is derived from a calculation of market prices, Tenex has every incentive to maximize the market value of the HEU Agreement transactions and to avoid pricing that would drive down market prices and thereby undercut revenue from the HEU Agreement transactions.

## II. The Russian Uranium Suspension Agreement

In addition to the HEU Agreement, the Suspension Agreement is also relevant to the regulation of Russian uranium products imported into the United States.[14] The Suspension Agreement covers imports

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[13] *See* USEC Inc. News Release, *supra* note 10. USEC insisted that the price terms be renegotiated to include a multi-year retrospective market price index to minimize the disruptive effect of short-term market price swings and to include a discount component that allows USEC to purchase Russian SWU at below-market prices and resell at market prices. Id.

[14] On December 5, 1991, Commerce initiated an antidumping duty investigation of imports of uranium (including uranium ore, uranium concentrate, and enriched uranium) from the Union of Soviet Socialist Republics ("USSR"). Following the

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of Russian LEU produced through commercial enrichment. However, nothing in the Suspension Agreement prevents exports pursuant to the HEU Agreement. Suspension Agreement, section M.1, 57 Fed. Reg. at 49237 ("This Agreement in no way prevents the Russian Federation from selling directly or indirectly any or all of the HEU in existence at the time of the signing of this Agreement and/or low enriched uranium ('LEU') produced in Russia from this HEU to [USEC]").

Throughout the duration of the Suspension Agreement, exports of Russian uranium products to the United States consisted of (i) HEU Agreement transactions in which Tenex sold SWU to USEC,[15] (ii) reexport quota transactions in which Russian uranium was imported for further processing into fuel rods in the United States and then re-exported for non-U.S. consumption, or (iii) for a brief time, limited quantities of SWU, inventory materials or uranium sold

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USSR's dissolution on December 25, 1991, Commerce continued the antidumping investigation as to each of the newly independent states, and eventually entered into separate agreements with six of the countries, including the Russian Federation, to suspend the antidumping investigations. Suspension Agreement, 57 Fed. Reg. at 49220-49261.

[15] Suspension Agreement, section M.1, 57 Fed. Reg. at 49237. The October 3, 1996 amendment to the Suspension Agreement provided that exports of Russian-origin uranium products derived from the down-blending of HEU under the HEU Agreement would not be counted against the export limits of the Suspension Agreement. *Amendments to the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation*, 61 Fed. Reg. 56665 (Dep't of Commerce Nov. 4, 1996).

under "matched sales contracts."[16] Russia and Commerce recently signed an amendment to the Suspension Agreement, effective February 1, 2008, granting Tenex the immediate right to enter into contracts for the sale of Russian uranium products directly to U.S. utilities in the United States. *Amendment to the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation*, 73 Fed. Reg. 7705, 7706 (Dep't of Commerce Feb. 11, 2008). Exports of Russian uranium pursuant to these commercial contracts would not begin until 2011 and would be subject to limits that increase each year, which from 2014 through 2020 are set at 20 percent of the estimated nuclear fuel market demand for the U.S. market. *Id.* at 7706; Press Release, U.S. Department of Commerce, United States and Russian Uranium Agreement Reached (Feb. 1, 2008) ("The Agreement, which has been under negotiation for two years, permits Russia to supply 20 percent of U.S. reactor fuel until 2020").[17]

Finally, the Amendment further provides that "[Commerce] will abide by the *Eurodif* decisions in its determination of the likelihood of continued or recurring dumping" and that the Suspension Agreement

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[16] The original Suspension Agreement provided for quotas for multi-year contracts (Section IV.C.2 ("Appendix A" contracts)); the exportation of Russian uranium pursuant to grand-fathered (Continued) contracts (Section IV.K ("Appendix C" contracts)); exports pursuant to inventory materials (Section IV.E.); and exports of Russian uranium that were entered for processing in the United States and subsequent re-export within 12 months of entry for consumption outside the United States (Sections IV.G., IV.H). 57 Fed. Reg. at 49236-37.

[17] *Available at* http://www.commerce.gov/NewsRoom/PressReleases_FactSheets/PROD01_005136?format_for_print=true.

will terminate on December 31, 2020. 73 Fed. Reg. at 7707.

## ARGUMENT

### I. The Nature of Uranium Trade and the Short Time Horizon for the HEU Agreement Limit Any Possible Effect of The Lower Court's Decision on the HEU Agreement

The view that affirmance of the decision below[18] would give Russia an incentive to stop downblending HEU under the HEU Agreement in favor of conventional LEU production, and that this would harm U.S. national security, foreign policy, and energy policy is both legally irrelevant[19] and factually incorrect. The HEU Agreement will terminate in 2013. That fact, combined with the prevalence of long-term contracts in the uranium industry, would sharply limit any effect that this Court's decision could have on Russia's performance under that agreement.

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[18] *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005) (Pet. App. 8a-28a), *aff'd on reh'g*, 423 F.3d 1275 (Fed. Cir. 2005) (Pet. App. 29a-35a), *final judgment*, 506 F.3d 1051 (Fed. Cir. 2007) (Pet. App. 1a-7a). Citations ("Pet. App.") are to the petitioners' appendix to the United States' petition for *writ of certiorari* in Case No. 07-1059.

[19] These policy considerations relate to neither the underlying factual record nor the administrative proceeding giving rise to the case now before the Court. Nor are such policy concerns in any way germane to the legal issues presented in this case, which concern the interpretation of a trade statute of general application. Finally, the Court should not disregard the literal terms of the statute and expand the scope of the antidumping law because of perceived "undesireable consequences." *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S.Ct. 2411, 2420 (2007) (a statute's perceived "undesireable consequences" is a "policy debate that belongs in the halls of Congress, not in the hearing room of this Court").

Long-term contracts have already locked up much of the market for the remaining five years of the HEU Agreement. As the U.S. International Trade Commission ("ITC") documented in 2006, long-term contracting dominated the U.S. uranium market for the previous five years. *Uranium from Russia*, U.S. Int'l Trade Comm'n Pub. 3872, Inv. No. 731-TA-539-C (Second Review) at II-4, Table II-1 (Aug. 2006)("ITC Second Sunset Determination")(reporting that 93.9% of SWU was purchased pursuant to long-term contracts from 2000 through 2005). It is indisputable that this remains the case today, and expectations are that long-term contracts will dominate the market for SWU transactions for the foreseeable future. *See e.g.*, Haruo Maeda, *The Global Fuel Market, Supply and Demand 2007-2030*, at 8 (World Nuclear Ass'n 2008) ("WNA, *The Global Fuel Market, 2007*") ("Most uranium continues to be traded on the basis of multi-annual contracts, based on perceived utility requirements").[20] Indeed, if anything, "both the percentage of utility fuel requirements being purchased pursuant to long term contracts and the length of the contract is increasing." ITC Second Sunset Determination at 42 (dissenting views of Commissioner Lane). In particular, U.S. utilities purchase uranium usually under long-term purchase contracts that run three to seven years, or longer. *Id.*

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[20] *The Global Fuel Market, Supply and Demand* is a leading source of market information. *See, e.g.*, ITC Second Sunset Determination at 26 n. 167 (*citing The Global Fuel Market, Supply and Demand* for its calculation of U.S. nuclear reactor uranium requirements); USEC, Inc. Annual Report (Form 10-K) at 57 (Feb. 26, 2008) (*citing The Global Fuel Market, Supply and Demand* 2005-2030 projections that globally 107 reactors will be added and 42 may be shut down by 2020, representing about a 22 percent net increase).

at 23 (majority views) and II-15 (reporting that U.S. utilities purchased the majority of the processing, *e.g.*, SWU, through long-term contracts, which are purchases made three or more years prior to use of the purchased service). Moreover, USEC decides whether it will fulfill existing long-term contracts with utilities using SWU obtained under the HEU Agreement or SWU from other sources (*i.e.*, self-production or stockpile).

Both suppliers and customers desire and benefit from predictability and market stability. Utilities want dependable and diverse supply sources of enrichment services and LEU. Suppliers like Tenex want diversity of customers as well as relative stability in sales revenues. Accordingly, suppliers need to maintain goodwill within the industry to achieve stability and predictability. Consistent with basic commercial and economic considerations, Tenex's near- and long-term interests lie in being perceived as a reliable supplier of the market. Avoiding potential litigation associated with the disruption of long-term contracts is also a relevant consideration. The view that Tenex is motivated solely by short-term economic opportunism is inconsistent with the complexities of uranium trade and Tenex's commercial interests.

As a practical matter, therefore, the vast majority of U.S. utilities' supply requirements have already been locked in under existing long-term contracts for the remaining five years of the HEU Agreement. Given this context, even if the Russian Government/Rosatom chose to exercise the right to terminate the HEU Agreement with one year's notice (HEU Agreement, Article VI(3)), the available demand from U.S. utilities would be limited because U.S. utilities are

already committed to purchasing their requirements under pre-existing long-term contracts.

## II. The Pricing Terms of the HEU Agreement Independently Deprive Russia of Any Substantial Incentive to Reduce HEU Downblending in Favor of Conventional Enrichment Techniques

Even apart from the temporal considerations discussed above, affirmance of the decision below still would not give Russia an incentive to scale back transactions dependent on downblending HEU in favor of conventional uranium enrichment, because doing so would deprive Russia of the higher revenues it otherwise stands to earn under the HEU Agreement.

The price that USEC pays Russia for SWU under the HEU Agreement is derived from the calculation of published market price indicators. USEC Inc. News Release, *supra* note 10. Hence, in order to maximize the market value of the SWU sold to USEC pursuant to the HEU Agreement, Russia rationally would try to avoid making sales at commercial prices that would drive the market prices down.[21] This would then be reflected in the indexed price USEC pays Russia for the HEU Agreement Russian SWU. As noted in USEC Inc. News Release, for the remainder of the term of the HEU Agreement, Russia will sell 5.5 million SWU annually to USEC, which represents approximately 40 percent of the estimated U.S.

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[21] Revenue from Russia's sales pursuant to the HEU Agreement go to the Russian state, whereas the Russian state only receives monies in the form of taxes paid by Tenex on revenue derived from conventional uranium enrichment pursuant to Tenex's non-HEU, commercial transactions.

annual SWU requirements of almost 14 million SWU. *DOE 2006 HEU Agreement Effects Report* at 6 (reporting that U.S. demand for 2006 is estimated to be nearly 14 million SWU). As also noted, DOE calculated SWU prices at $116 to $135 per SWU for 2006. *Id.* Throughout 2007, uranium industry publications reported SWU prices were between $128 and $143 per SWU. NUCLEAR FUEL, *supra* note 12. Even under the pricing formula that was amended in 2002 to allow USEC to purchase at a discount to a historical index of long-term and short-term U.S. and international market prices, *see* USEC Inc. News Release, the amount of revenue generated solely from the SWU sales is significant. Using the lower-end DOE SWU price, which is known to be conservative, 5.5 million SWU at $116 per SWU would be $638 million per year.

In this context, it would not be economically rational for Russia to divert even a portion of the SWU volume under the HEU Agreement to pursue new commercial contracts for any of the smaller remaining amount of open U.S. market demand in a manner that would adversely affect the pricing on this large volume of sales to USEC. Tenex has economic disincentives to price aggressively low on new contracts because any underselling on new commercial contracts would ultimately drive down the price of the SWU sold to USEC under the HEU Agreement as the pricing formula is derived from published market price indicators. The large volume of HEU Agreement sales to the U.S. market – and the revenue stream associated with those sales – would deter a strategy aimed at pursuing below-market sales that would drive down prices under the HEU Agreement and ultimately reduce the revenue Russia derives from sales under that Agreement.

## III. Concerns About Russia's Excess LEU Capacity Are Overstated Because They Ignore Russia's Expanding Home-Market and Third-Country Demand

Russia's enrichment capacity is substantially committed to existing long-term contracts and increased demand for Russian enrichment services in Russia and in third countries. ITC Second Sunset Determination at IV-19 (Rosatom statement to the ITC). *The Global Fuel Market, Supply and Demand* estimated that Russia's uranium requirements for nuclear reactors will increase by 23 percent from 2005 to 2010 because of three new reactors planned for start-up by 2010. Haruo Maeda, *The Global Fuel Market, Supply and Demand 2005-2030*, at 50 and 81 (World Nuclear Ass'n 2006) ("WNA, *The Global Fuel Market, 2005*"). Russian companies supply all of the uranium fuel required by Russian nuclear reactors, and these requirements are expected to increase with the planned construction of new nuclear power plants in Russia. *Id.;* WNA, *The Global Fuel Market, 2007* 41-42 (Russia plans to build 42 new nuclear reactors by 2030) and 155 ("it is clear that the Russian system now has its own rising demand for fuel, and this must be satisfied first, so the fuel exports will likely fall substantially").

In addition, Russia's substantial sales of LEU and SWU to third country markets are substantial and projected to experience significant growth.[22] This

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[22] WNA, *The Global Fuel Market, 2005* at 43, 46, 163 and 172 ("Given that [China and India] do not have abundant low-cost uranium reserves, it appears realistic to proceed on the assumption that if Russia supplies the reactor technology, it will also supply the fuel"); WNA, *The Global Fuel Market, 2007* at 152

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trend is consistent with the fact, as noted, *see supra* at 6-7, that Russia's uranium sales in the U.S. market are below quantities permitted under U.S. law. To meet substantial demand, including to ensure that Russia would have sufficient natural uranium to blend down HEU for the remaining term of the HEU Agreement, Tenex requested agreement by the Western Companies to waive their options to purchase HEU feed, *i.e.*, natural uranium, returned to Russia pursuant to the USEC Privatization Act and the HEU Commercial Feed Agreement.[23] Russia

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(stating that nuclear reactors in Russia, the former Soviet republics and in India and China are Russian-built and it is assumed Russia will supply these reactors for the foreseeable future). World-wide prices for LEU, SWU and natural uranium are at historic highs because of significant global demand and tight supply. WNA, *The Global Fuel Market, 2005* at 99 ("[A strong market reaction] started in 2003 with a strong upward movement in world uranium prices (the spot market price tripled by the middle of 2005)"); WNA, *The Global Fuel Market, 2007* at 97 ("The extent of the [spot market] price rise (a more than tenfold increase since early 2003, from $10/lb to over $135/lb in mid-2007) took the uranium market to historic levels in both real (inflation adjusted) and nominal terms"); ITC Second Sunset Determination at Figure V-2 (*citing* Ux Weekly 2002-2006). Projections are that global demand will outpace global supply by around 2016. WNA, *The Global Fuel Market, 2007* at 166, Fig. 5.9.

[23] *DOE 2004 HEU Agreement Effects Report* at 4 ("In June 2004, Russia and the Western Consortium announced an amendment to the Commercial Feed Agreement...in light of Russia's rising requirements for uranium to fuel their expanding nuclear plant construction program within Russia and abroad...The removal of 74 million pounds of uranium and conversion from the uranium and conversion markets may have an effect due to the reduction in supply in markets that are cur-

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also is re-enriching depleted uranium to produce LEU, even though this is a relatively uneconomic process, because of the substantial demand for LEU in its home market and third country markets. ITC Second Sunset Determination at 27-28 and IV-17 (noting that *The Global Nuclear Fuel Market* reports that Russia is the world's largest re-enricher of depleted uranium); WNA, *The Global Nuclear Fuel Market, 2007* at 3 ("it is known that substantial spare Russian enrichment capacity has been used to re-enrich depleted uranium").

Finally, as noted, in the most recent amendment to the Suspension Agreement that became effective in February 2008, Russia agreed to annual export limits from 2014 to 2020 equal to twenty percent of U.S. market demand. Suspension Agreement, 73 Fed. Reg. at 7706. Even though Russia's SWU sales to USEC pursuant to the HEU Agreement currently account for more than twenty percent of U.S. market annual demand, Russia agreed to a lower share of the U.S. market through commercial sales directly to the U.S. utilities after the HEU Agreement expires. Given the projected increased demand in Russia, Asia and Eastern Europe and other non-U.S. markets, Russia was willing to agree to lower U.S. market share in order to achieve a more balanced and diversified sales portfolio.

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rently in supply/demand balance"). Rosatom has stated that "[t]o help Russia meet its internal requirements for natural uranium...it plans to take back additional quantities of $UF_6$ that it receives under the HEU Agreement." ITC Second Sunset Determination at IV-18.

## CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted,

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